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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1918

No. 22

WARREN H. PILLSBURY AND ALBERT FOTE, DEPUTY
COMMISSIONERS OF THE THIRTEENTH CEMENT
DISTRICT, ETC., PETITIONERS

UNITED ENGINEERING COMPANY, A CORPORATION
RESPONDENT, INSURANCE COMPANY, ETC.

APPEAL FROM THE DISTRICT COURT OF
APPEALS FOR THE NINTH CIRCUIT

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No. 12644

**United States
Court of Appeals**
for the Ninth Circuit.

WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act,

Appellant,

vs.

UNITED ENGINEERING COMPANY, a Corporation, and **FIREMAN'S FUND INSURANCE COMPANY**, a Corporation,

Appellees.

Transcript of Record

**Appeal from the United States District Court
Northern District of California,
Southern Division.**

NAMES AND ADDRESSES OF ATTORNEYS

FRANK J. HENNESSY,

United States Attorney.

EDGAR R. BONSALE,

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Post Office Building,

San Francisco, California.

Attorneys for Defendant

and Appellant.

JOHN H. BLACK,

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San Francisco, California.

Attorneys for Plaintiffs and Appellees.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 28735G

UNITED ENGINEERING COMPANY, a Corpo-
ration,

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Plaintiffs,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner for the Thirteenth Compensation Dis-
trict, Under the Longshoremen's and Harbor
Workers' Compensation Act,

Defendant.

COMPLAINT FOR INJUNCTION PURSUANT
TO TITLE 33, U.S.C.A., SECTION 921

To the Honorable District Court of the United
States, Northern District of California, South-
ern Division:

The plaintiffs, United Engineering Company, a
corporation, and Fireman's Fund Insurance Com-
pany, a corporation, respectfully show:

I.

Plaintiff, United Engineering Company, at all
times herein mentioned has been and now is a corpo-
ration; Plaintiff Fireman's Fund Insurance Com-
pany, at all times herein mentioned has been and

now is a corporation. Both of said corporations have their principal offices in the City and County of San Francisco, State of California.

II.

That plaintiff Fireman's Fund Insurance Company, a corporation, at all times herein mentioned, was the Longshoremen's and Harbor Workers' Compensation insurance carrier for said United Engineering Company, a corporation.

III.

On the 12th day of May, 1947, one, Howard Johnson, was in the employ of the said United Engineering Company as a longshoreman and on said date was working as such longshoreman aboard the Steamer Monterey on navigable waters of the United States at Alameda, California.

IV.

On said date and at said place, the said Howard Johnson suffered an injury to his back and neck, while employed as longshoreman by said United Engineering Company.

V.

That thereafter on May 14, 1947, plaintiffs herein provided medical treatment to the said Howard Johnson for the said injuries.

VI.

That the plaintiff United Engineering Company duly filed with defendant a report covering said injuries in accordance with Section 30 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 930.

VII.

That no compensation payments were ever made to the said Howard Johnson or promised by said plaintiffs, or either of them.

VIII.

That on the 17th day of January, 1949, a claim for compensation was filed with the defendant Deputy Commissioner by the said Howard Johnson, alleging that the said injury of May 12, 1947, first caused disability on August 12, 1948.

IX.

On March 17, 1949, defendant made and entered a compensation order awarding compensation payment to the said Howard Johnson, as follows:

Federal Security Agency, Bureau of Employees'
Compensation, 13th Compensation District
Compensation Order Award of Compensation
Case No. 1366-1134, Claim No. 3178

In the matter of:

The claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

HOWARD JOHNSON,

Claimant,

against

UNITED ENGINEERING COMPANY,

Employer.

FIREMAN'S FUND INSURANCE COMPANY,

Insurance Company.

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

Findings of Fact

That on the 12th day of May, 1947, the claimant above named was in the employ of the employer above named at San Francisco Harbor, in the State of California, in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Fireman's Fund Insurance Company; that on said day claimant herein, while performing service for the employer as a welder leaderman, and engaged in ship repair work on a completed vessel on navigable

waters of the United States, sustained personal injury arising out of and in the course of his employment with the employer herein and resulting in disability as follows: While going up a ladder he bumped his head and neck on a cross-beam, sustaining extensive strain of the muscles of the neck which still continue painful; that defendants pleaded at the first hearing that the claim was barred by the period of limitations prescribed by said Act; that the claim was filed on January 17, 1949; that Employer's First Report of Injury was filed on May 28th, 1947; that the employer continued claimant in lighter work in a partially disabled condition without reduction in wages because of such physical impairment until it disposed of its ship-repair plant on May 15, 1948; that by reason of such provision of lighter work claimant did not lose time from work as a result of his injury until about June 15, 1948; that defendants have furnished claimant with medical treatment throughout; that no cause of action accrued in favor of claimant under the Longshoremen's and Harbor Workers' Compensation Act until the completion of one week's disability from labor after June 15, 1948, and that therefore the claim for compensation is not barred by said period of limitations; that the average weekly earnings of the claimant herein at the time of his injury amounted to the sum of \$72.80; that by reason of said injury claimant has been temporarily and partially disabled from labor from June 15, 1948, to January 31, 1949, less two weeks in which he secured employment at odd jobs;

that he was to return to work on January 31, 1949, the day of the hearing, but that the nature and duration of said work and wages therefore have not yet been placed in evidence; that claimant's disability during said period was temporary and partial and amounted to loss of 50% of his earning capacity by reason of his inability to perform various parts of his regular work and consequent loss of employment opportunities otherwise open to him; that he did no work during said period, and that he is entitled to compensation therefor at the rate of \$24.13 a week for 32-6/7ths weeks amounting to \$792.84, no part of which has been paid; that from and after January 31st, 1949, he will be partially disabled from labor and that such disability is fixed at a minimum extent until further information is submitted as to his current wage earning capacity; that he is therefore entitled to compensation at \$8.00 a week, payable in installments each two weeks until a change in the extent of his wage earning capacity or the further order of the Deputy Commissioner; that claimant's attorneys, Smith & Parrish, have rendered legal service to claimant in the prosecution of his claim at the reasonable value of \$50.00 and are entitled to lien therefore upon compensation herein awarded;

Upon the foregoing facts the Deputy Commissioner makes the following:

Award

That the employer, United Engineering Company, and the insurance carrier, Fireman's Fund Insur-

ance Company shall pay to the claimant compensation as follows:

The sum of \$792.84 forthwith as of January 31, 1949, less however, the sum of \$50.00 to be deducted therefrom and paid to claimant's attorneys, Smith & Parrish upon their lien for attorney's fees; to claimant the further sum of \$8.00 a week, payable in installments each two weeks beginning February 1, 1949, until the further order of the Deputy Commissioner.

Given under my hand at San Francisco, California, this 17th day of March, 1949.

WARREN H. PILLSBURY,
Deputy Commissioner,
13th Compensation Dist.

Every payment awarded under a Compensation Order earns 20% additional if not paid within 10 days from the date it becomes due.

X.

That the evidence in the hearing before the said defendant is without conflict that the said Howard Johnson sustained injury on the 12th day of May, 1947, that he received medical treatments therefor and that no compensation payments were made or promised to the said Howard Johnson by the plaintiffs, or either of them.

XI.

That no claim for compensation was filed with the Deputy Commissioner by or on behalf of the

said Howard Johnson until more than one year after the injury of May 12, 1947, to wit: January 17, 1949.

XII.

That prior to the first hearing on said claim, plaintiffs pleaded that said claim was barred by the period of limitations prescribed by the said Longshoremen's and Harbor Workers' Compensation Act.

XIII.

That by the said Compensation Order of March 17, 1949, the plaintiffs herein are ordered to pay \$792.84 in one lump sum to said Howard Johnson, as of January 31, 1949, less the sum of \$50.00 to be deducted and paid to the said Howard Johnson's attorneys, and that the plaintiffs are further required to pay to the said Howard Johnson the sum of \$8.00 per week beginning February 1, 1949, until further order of the said defendant Deputy Commissioner.

XIV.

Plaintiffs are informed and believe, and upon such information and belief, allege that the said Howard Johnson, claimant in the said proceedings before the defendant Deputy Commissioner, to whom compensation payments are ordered to be paid as aforesaid, is a person of no financial means and without property, and if plaintiffs should pay to him the sums awarded in said Compensation Order, they could not be recovered back and that accordingly plaintiffs will suffer great and irreparable

damage and injury if said award and order is not stayed.

XV.

The said claim for compensation was not filed with the Deputy Commissioner until January 17, 1949, although the Deputy Commissioner found that claimant was disabled from June 15, 1948. The claim was, therefore, not filed until over seven months after the date that disability is alleged to have begun. The defendant's award, therefore, has placed plaintiffs in the position of being required to pay accrued compensation in the amount of \$792.84 together with additional compensation at the rate of \$8.00 per week thereafter.

XVI.

Plaintiffs are informed and believe that an early date for a hearing on the merits of this matter can be had before this Honorable Court.

XVII.

Plaintiffs believe that there is a great probability that the said Compensation Order of the defendant will be set aside by this Court on the ground that said defendant had no jurisdiction to issue such Order in view of the uncontradicted evidence that the said claim was filed more than one year after the date of said injury.

Wherefore, plaintiffs pray that said Compensation Order and Award be set aside and the same and its enforcement be permanently enjoined and restrained; that in addition said compensation order may be suspended and that an order be entered for

an interlocutory injunction suspending the same during the pendency of this action; that payments required by said order and award and each of them be stayed until final decision herein; and that this Court may find and adjudge that the said claim for compensation was filed more than one year after the said injury and that, therefore, the said Howard Johnson's right to compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act is barred; and that plaintiffs should not be, nor is either of them subject to or liable to pay compensation because of the said injury to the said Howard Johnson; and that said claim is not within the jurisdiction or power of defendant to administer or apply as against either plaintiff; and for such other and further relief as to the Court may seem just.

/s/ JOHN H. BLACK,

/s/ EDW. R. KAY,

Attorneys for Plaintiffs, United Engineering Company and Fireman's Fund Insurance Company.

United States of America,

Northern District of California,

City and County of San Francisco—ss.

Geo. Jordan, being first duly sworn, deposes and says:

That he is one of the officers, to wit, Vice President of the Fireman's Fund Insurance Company, a corporation, one of the plaintiffs herein; that he has

read the foregoing Complaint for Injunction Pursuant to Title 33, USCA Section 921, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters set forth therein upon information and belief, and as to these matters he believes it to be true.

/s/ GEO. JORDAN.

Subscribed and sworn to before me this 25th day of March, 1949.

[Seal] /s/ NORMA L. MACHUGH,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires January 15, 1952.

[Endorsed]: Filed March 25, 1949.

[Title of District Court and Cause.]

MOTION TO DISMISS

Now comes the defendant, Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission, by his attorney, Frank J. Hennessy, United States Attorney, and Edgar R. Bonsall, Assistant United States Attorney, for the Northern District of California, and moves this Court to dismiss the Bill of Complaint after review of the Compensation Order filed herein, for the following reasons:

- (1) That the Bill of Complaint filed herein does

not state a cause of action, and does not entitle plaintiff to any relief, nor does the said Bill of Complaint state a cause of action against the defendant, Warren H. Pillsbury, Deputy Commissioner, upon which relief can be granted.

(2) That it appears from the Bill of Complaint including the transcripts of testimony taken before the Deputy Commissioner that the compensation order filed by him on March 17, 1949, complained of in the Bill of Complaint, was supported by evidence, and under the law said findings of fact should be regarded as final and conclusive.

(3) That it appears from the Bill of Complaint, including said transcripts of testimony, that said Compensation Order complained of herein is in all respects in accordance with law.

(4) For such other good and sufficient reasons as may be shown.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ EDGAR R. BONSALE,
Assistant United States Attorney, Attorneys for
Defendant, Warren H. Pillsbury

This motion will be based on the complaint and pleadings now on file in this matter and the certified copy of the transcript of the proceedings in the case before Deputy Commissioner Warren H. Pillsbury now filed in this court.

[Endorsed]: Filed October 14, 1949.

In the United States District Court for the North-
ern District of California, Southern Division

No. 28735

UNITED ENGINEERING COMPANY, a Cor-
poration, et al.,

Plaintiff,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner, etc.

Defendant.

Appearances:

JOHN H. BLACK,
EDWARD R. KAY,

233 Sansome Street,
San Francisco, California,

Attorneys for Plaintiffs.

FRANK J. HENNESSY,

United States Attorney.

EDGAR R. BONSALL,

Assistant United States Attorney.

MACKLIN FLEMING,

Assistant United States Attorney,
San Francisco, California.

Attorneys for Defendants.

OPINION

Goodman, District Judge.

In these four consolidated actions, the plaintiff employers and their respective insurance carriers have asked this court to set aside and enjoin the enforcement of Compensation Orders and Awards made by the Deputy Commissioner pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 USC 901-950. The question presented is whether the Deputy Commissioner lacked jurisdiction to make the awards because the claims for compensation were not filed within a year after the claimants were injured as is allegedly required by Section 13(a) of the Act. The Deputy Commissioner has moved to dismiss the complaints on the ground that the claims were timely filed and that therefore the awards were proper.

Section 13(a) of the Act provides that "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made, without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred." (Emphasis added.)

For a proper understanding of the issues presented, a brief account of the injuries suffered by

the claimants and the events leading up to the compensation awards is here necessary.

Claimant Howard Johnson on May 12, 1947, struck his head on a cross-beam of the vessel Monterey while working as a leaderman welder. The muscles of his neck were severely strained and he was unable to continue to weld aboard ship. His employer transferred him to lighter work in the machine shop at no reduction in wages. Although his neck continued to trouble him, he continued to work regularly for more than a year until he was discharged by the new owner of the ship yards because he was unable to weld aboard ship. Since that time he has been employed only intermittently because he is physically able to perform only the less strenuous types of welding operations. When Johnson first lost time from work, he was told it was too late for him to file a claim for compensation. But when he discovered how many employment opportunities were lost because of his condition, he decided to attempt to secure compensation. On January 31, 1949, more than a year and a half after the accident, he filed his claim with the Deputy Commissioner.

Claimant Frank Curnutt on February 17, 1947, while employed as a sheetmetal worker aboard the S. S. Lurline, wrenched his back when he lifted a pre-heater from the deck to a table. He did not work for several days. When he returned to his job, he was relieved of all heavy work on doctor's orders. With some discomfort, he performed lighter duties at his former wage rate until his job ended

in about a year. After resting for two weeks to give his back a chance to heal, he obtained work with the Bethlehem Steel Company. In June of 1948, he quit work for five weeks, as a therapeutic measure suggested by his physician. In July he went to work for a sheet-metal company, but soon was forced to give up this job, and subsequent ones, because the work proved too strenuous. On January 17, 1949, nearly two years after injuring his back, Curnutt filed his claim for compensation.

Claimant Louis Shallat on November 21, 1947, while working as a stevedore aboard the S. S. Mauna Lei, caught his hands between a sling and a bight. Considerable pain and swelling in his hands resulted. According to Shallat, his left hand has pained him continuously since it was injured and he has applied self-treatment. While he testified at the hearing before the Deputy Commissioner that the injury grew "more and more severe," he also stated that "the left hand is still the same as it was when I got injured." Shallat had lost no time from work up to the date of the final hearing before the Deputy Commissioner. At that hearing, Shallat stated that he did not file his claim for compensation until May 23, 1949, nearly a year and a half after he was injured, because he thought the injury "wasn't so serious," and that "it would work its way out."

Claimant Chris Manos was welding on the deck of the tanker Purisima on December 22, 1947, when he was struck on the head by an iron saddle falling from above. He was instructed by the examining

physician not to weld thereafter and consequently was given lighter work by his employer. He suffered no reduction in rating or wages. About two months later his employment terminated as a result of a general reduction in the number of men employed at the ship yard. In a week or so he obtained a shop welding job at a slightly higher wage than he had previously received at the ship yard. This job ended in January of 1949, due to a general lay off. At the time of the hearing before Deputy Commissioner on August 29, 1949, Manos was still unemployed, but was planning to engage in sales work. Manos' neck has troubled him continually since he was struck on the head and he has received regular medical treatment. In some respects the condition of his neck apparently gradually has improved and in others it has grown worse. Manos filed a claim for compensation on August 17, 1949, more than a year and a half after he was injured.

The Deputy Commissioner justified his awards to these claimants and now grounds his motion to dismiss these complaints on his conclusion that Section 13(a) of the Compensation Act sets the one-year period of limitation running, not from the date of injury, but from the date on which the injury became compensable. There may be merit to this interpretation of Section 13(a) but these causes can be determined without reaching the question.

In my opinion, the Deputy Commissioner erred in assuming that the injuries suffered by these claimants were not compensable so long as they con-

tinued to work with no reduction in wages. It is now settled law in this Circuit that a claimant is not precluded from recovering compensation under the Act because he has been paid his old wages at all times since resuming work after being injured. *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 F.2d 513 (1939). Accord, *Luckenbach S. S. Co. v. Norton*, 96 F.2d 764 (3 Cir. 1938); *Hartford Accident and Indemnity Co. v. Hoage*, 85 F. 2d 420 (App. D. C. 1936). The Act says nothing about "compensable injuries" but only provides that compensation must be paid for disability. Disability is defined by Section 2(10) as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." The statute makes earning capacity the test. Earning capacity may be properly defined to mean ability to earn, rather than wages actually received. And this means ability to earn in the open labor market, not ability to secure exceptional consideration from a sympathetic employer.

Although their employers did not reduce their wages, claimants Johnson, Curnutt, and Manos were physically unable, following their injuries, to perform the same duties they had previously performed. Pain and suffering were continuous. They were well aware that unless there was improvement in their physical condition, they would be unable to again engage in strenuous activity. Claimant Manos admitted that he was told by the physician, who examined him following his injury, that he could obtain compensation. Instead of doing so, at the same physician's suggestion, he sought and ob-

tained from his employer lighter work at his former wages.

Claimant Shallat apparently continued to perform the same duties following his injury as he had before. But, if his statements to examining physicians are accepted as true, he was in constant pain. The Compensation Act does not deny relief to an injured workman until his pain exceeds endurance.

All four of the present claimants have been disabled within the meaning of the Longshoremen's and Harbor Workers' Compensation Act since the day they were injured. Consequently they had compensable claims.¹ Such claims were not timely filed. It follows that the awards of the Deputy Commissioner were not within his power to make. The court is aware of the well established rule that the Deputy Commissioner's findings of fact should not be disturbed if there is any substantial evidence to support them. But his conclusion that these claimants suffered no disability until long after they were injured is based on an error of law. The undisputed factual record shows that the earning capacity of these men was impaired from the time of injury.

The delay in the filing of these claims is wholly understandable. None of these claimants appear to have been fully aware of his rights and obligations under the Compensation Act. And, even had these men realized the consequences of delay, it is only natural that they should hesitate to jeopardize their

¹See *Liberty Mutual Insurance Co. v. Parker*, 19 F. Supp. 686 (Md. 1937) in which the same conclusion was reached on somewhat similar facts.

opportunity to continue working at their former wage rate by pressing claims for compensation. In a relatively short time the wages of these claimants would have equaled the maximum awards they could ever hope to receive. These, however, are considerations for the lawmakers and not for the Courts.

The motions to dismiss are denied and the awards are severally set aside and vacated.²

Dated May 10, 1950.

[Endorsed]: Filed May 11, 1950.

²The above order in fact fits the issues raised by the pleadings. But in order to technically comply with the rule announced by our Court of Appeals in *Twin Harbor Stevedoring & Tug Co. v. Marshall*, supra, the causes are transferred to the Admiralty docket, the motions will be treated as exceptions and are overruled and a decree will enter vacating and setting aside the awards.

In the United States District Court for the Northern District of California, Southern Division

No. 28735—Civil

UNITED ENGINEERING COMPANY, a Corporation, et al.,

Plaintiffs,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, etc.,

Defendant.

ORDER AND DECREE

In the above-entitled case the motion to dismiss is denied and the award is severally set aside and vacated.

It is further ordered that the above-entitled case is transferred to the Admiralty docket, the motion will be treated as exception and is overruled and a decree is hereby entered vacating and setting aside the award.

Dated at San Francisco, California, this 11th day of May, 1950.

/s/ LOUIS E. GOODMAN,

United States District Judge.

(As amended by order of August 23, 1950.)

[Endorsed]: Filed May 11, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, defendant in the above-entitled action, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final order of this Court filed on May 11, 1950, denying the motion of the defendant to dismiss the complaint and vacating and setting aside the order of the defendant awarding compensation dated March 17, 1949.

Dated: July 3, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ EDGAR R. BONSALE,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed July 3, 1950.

United States Federal Security Agency
Bureau of Employees Compensation

Before Warren H. Pillsbury, Deputy Commissioner
13th Compensation District

Case No. 1366-1134

Claim No. 3178

HOWARD JOHNSON,

Claimant,

vs.

UNITED ENGINEERING CO.,

Employer,

FIREMAN'S FUND INSURANCE CO.,

Insurance Carrier.

TRANSCRIPT OF TESTIMONY AT HEARING
JANUARY 21, 1949.

Pursuant to notice, this matter was heard before Warren H. Pillsbury, Deputy Commissioner, Bureau of Employees Compensation, at the coroner's court, at 480 Fourth Street, Oakland, California, on Monday, the 31st day of January, 1949, at 11 a.m.

Appearances:

Claimant present in person and represented by
Joseph E. Smith, attorney.

Defendants represented by B. W. Greenough,
claims superintendent.

Mr. Pillsbury: Claimant states that he is represented by Joseph E. Smith, attorney-at-law, who has been detained. After waiting a considerable time, I informed the parties that I will make up the formal parts of the record while we are waiting for him.

The claim is for sprain and contusion of the neck due to injury of May 12, 1947. The employer filed a first report of injury on May 28, 1947, stating that the injury did not cause loss of time. Nothing further was heard until I received Mr. Smith's letter of December 28, 1948, asking for conference in Oakland. Informal conference was held on January 10, 1949, which did not adjust the matter in view of the position taken by defendants to be repeated in a few moments. No compensation has been paid. Claim was filed following said conference on January 17, 1949, and now comes on for hearing.

Mr. Greenough, what is defendant's position?

Mr. Greenough: We raise the issues of nature and extent of disability, liability for compensation and medical expense, and we will plead that the claim is barred by the statute of limitations.

Mr. Pillsbury: I have the following medical reports in my file which are exhibited for introduction in evidence:

Report of Dr. H. D. Berlin, of August 3, 1948, received as Exhibit "A";

Report of Dr. W. F. Holcomb, of August 12, 1947, Exhibit "B";

Report of Dr. H. D. Berlin, of August 3, 1948, on another form, Exhibit "C."

Does either side have any further medical reports?

Mr. Greenough: I have none.

Mr. Pillsbury: We will suspend until the arrival of Mr. Smith.

(Reconvened upon arrival of Mr. Smith.)

Mr. Pillsbury:

The Following Facts Are Agreed to by the Parties:

1. That claimant Howard Johnson was in the employ of defendant United Engineering Company at Alameda, California, on and about May 12, 1947, as a welder leaderman, and at said time said employer had secured the payments of compensation under the Longshoremen's and Harbor Workers' Compensation Act by insurance in Fireman's Fund Insurance Company;

2. That claimant was injured on said date, said injury occurring in the course of and arising out of his employment and consisting in his sustaining a strained condition of the neck;

3. That at said time claimant was performing ship repair service on the S. S. "Monterey," a vessel on navigable waters of the United States, and the claim is within the provisions of said act;

4. That claimant's average earnings at said time were over \$37.50 a week;

5. That no compensation has been paid.

The Issues Are:

1. Whether the claim is barred by the period of limitations prescribed by said Act;

2. Nature and extent of disability;

3. Whether claimant is entitled to further medi-

cal treatment.

It Is Further Stipulated that claimant has not been to any expense for medical treatment to date.

Mr. Pillsbury: Any other issues, Mr. Greenough?

Mr. Greenough: No, none.

Mr. Pillsbury: With reference to the defense of limitations, the record may show that I have in my file the employer's first report of injury which shows no loss of time from work and which was received in my office May 28, 1947. The claim for compensation was filed on January 17, 1949.

HOWARD JOHNSON

claimant, having been first duly sworn, testified as follows:

By Mr. Pillsbury:

Q. What is your full name?

A. Howard Johnson.

Q. You live at 572-C Buena Vista, Alameda, California?

A. Yes.

Q. You were hurt on May 12, 1947, on the "Monterey"?

A. I think. I am not very good on remembering dates.

Q. What happened to you?

A. I was taking a welder there below in the engine room to show him the job. There were some beams across and I hit my head and neck.

Q. You bumped your head while you were going up a ladder?

(Testimony of Howard Johnson.)

A. Yes, right across there (indicating).

Q. Have you lost any time from work on account of this injury?

A. Well, I think I have.

Q. When did you first lose time from work?

A. As soon as Todd Pacific took over.

Q. When was that?

A. That was I think February—no, March 15 I think they took over.

Q. 1948? A. Yes.

Q. Up to that time you had not lost any time from work? A. No.

Q. What happened commencing March 15, 1948, with reference to your condition and loss of time?

A. In the reduction of work over there I was first lowered from leaderman to welder and I was told by Dr. Dixon and Dr. Holcomb, both, not to use a heavy—

Q. Were your wages reduced?

A. Yes, they were reduced to \$1.75.

Q. Why was that, if you know?

A. I was a leaderman and that pays more money than regular welder.

Q. Why were you reduced, if you know?

A. I guess they had laid off so many men they didn't need me as leaderman any longer.

Q. How much longer did you continue to work after that?

A. They put me to work in the machine shop as acetylene welder and I got along very nicely there.

(Testimony of Howard Johnson.)

When Todd Pacific took over they got a new foreman and he insisted that I should go out to the boats and work under the boats, and I told him I couldn't. So they laid me off.

Q. When was that?

A. I don't know the exact date I was laid off.

Mr. Pillsbury: Have you any information, Mr. Greenough?

Mr. Greenough. I think I can correct the record in regard to the time Todd Pacific took over, May 15.

Mr. Pillsbury: Have you anything further beyond that, Mr. Greenough?

Mr. Greenough: I am sure I have the date he was transferred.

Mr. Pillsbury: That was 1948, was it?

Mr. Greenough: Yes.

Q. (By Mr. Pillsbury): What has been the condition of your neck since May, 1948?

A. Well, right now it is aching. It bothers me to sit still.

Q. Can you do the full work of a welder?

A. No. Acetylene welding like in a machine shop is not too much work. You have rest periods.

Q. What have you been doing since you laid off?

A. I took on a job at Emdee's Sheet Metal Works and I worked there three days and I could not stand it. I stayed there three days and then I went from there I went to Iola Equipment Company. I worked there two and a half days and that is about all.

(Testimony of Howard Johnson.)

Q. What did you make an hour on those two jobs?

A. At the time the raise hadn't gone through. I worked \$1.62 at Emdee's and for the same over there, and I took one more job after that, a guard job. I worked a week. A fellow was on a vacation or someone was sick.

Q. How much did you make on that, how much a day? A. I got \$55.00 for seven days work.

Q. What were your wages at the time you got hurt? A. \$1.82.

Q. An hour? A. Yes.

Q. For how many hours a week?

A. Forty.

Q. And you have done no other work up to now?

A. No.

Q. You have a job now, have you?

A. I started this morning. Jim was going back to work for Todd Pacific and he notified me last week my job was there for me.

Q. You are going back to work?

A. I told him I would take off two hours. I thought I would take off to twelve.

Q. How much do you make on this job?

A. \$1.75.

Q. What kind of a job is it?

A. Just acetylene welding in a machine shop.

Q. Why haven't you done more work since last May?

A. My neck wouldn't permit me to weld.

Q. Why did you lose so much time in making

(Testimony of Howard Johnson.)

claim for compensation?

A. At the time I thought it pretty wise to keep moving and the foreman gave me a job in the acetylene shop I could handle, and I didn't do anything until I was laid off, and I went to see Greenough and then he said it was too late, could not get anything.

Q. Why did you wait so long after that to do anything on your case?

A. He said there was nothing I could do. It was over a year—the fellow in his place.

Q. Then, how did you start getting started on your case?

A. I started to get hungry there looking for something, so I told the Union Hall, so Joe Lobree suggested that I go to Mr. Smith and see what could be done about it.

Mr. Pillsbury: Mr. Smith, any questions?

Q. (By Mr. Smith): Since your injury you are only able to do certain types of welding work?

A. That is right.

Q. Is that the reason you haven't been able to be fully employed? A. That is the reason.

Q. (By Mr. Greenough): You say you were reduced immediately after Todds took over the yard?

A. I lost my job. I probably worked there a month after Todd took over, and I and the foreman could not get along. He wanted to send me out on boats and I told him I couldn't.

Q. They let you off at that time? A. Yes.

(Testimony of Howard Johnson.)

Q. What was your condition at that time?

A. Dr. Dixon told me he could put my neck in a cast.

Mr. Greenough: I just want to ask you what your condition was at that time.

Q. (By Mr. Pillsbury): What is your condition now?

A. It is the same. It just don't change.

Q. (By Mr. Greenough): You first came to my office in August?

A. I don't know just when. I was over there two times and both times you were off.

Mr. Greenough: No further questions.

Mr. Pillsbury: Hearing closed.

Mr. Smith: Attorney's fee requested.

REPORTER'S CERTIFICATE

I hereby certify that the foregoing is a correct transcript of the testimony and proceedings taken in the above matter at the hearing held on the 31st day of January, 1949.

/s/ L. P. SMITH,
Reporter.




EXHIBIT "A"

Copy of excerpt from report of Dr. H. D. Berlin, August 3, 1948:

"4. Date of accident or first illness? May, 1947.

"5. Dates of treatment rendered by you? 8/2/48.

"6. Other treatments, by whom? Doctors Lum, Jones, Holcomb and Dickson.

"7. Nature of treatment by you? Examination—report.

"8. What further treatment indicated?

"9. Who engaged your services?

"10. Was injured person hospitalized? Yes.

"11. State in patient's own words, how accident occurred or occupational disease was caused: As he was going up a ladder he hit his head on a beam, injuring his neck.

"12. Give an accurate and complete description of the nature and extent of injury (please fill in diagram on back): Unable to sleep, neck stiff in morning until he limbers up, has been taking daily physiotherapy at plant.

"18. On what date do you think the injured person will be able to resume his usual work? Working.

"/s/ H. D. BERLIN, M. D."

EXHIBIT "B"

Copy of excerpt from report of Dr. W. F. Holcomb, August 12, 1947:

"Mr. Howard H. Johnson, age 33, welder, living at 572 C Buena Vista Avenue, Alameda, California, was examined by me first on July 30, 1947.

"History: According to his statement he was injured approximately three months ago, while he was at work as a leaderman for the United Engineering Company. He stated that he was running out of the fire room and bumped his head on a beam. He was knocked down with considerable force, although, the fall was somewhat broken by a welder who was behind him. He went to the first aid station where heat treatments were given and reported to the office of Dr. Donald Lum a few days later. X-ray pictures were taken at the Alameda Hospital, which did not show any evidence of fracture or dislocation. He was advised that he had a neuritis and that he should continue his ordinary occupation as best he could.

"Present Complaints: His present complaints are that he cannot sleep; that he has pain that extends from the base of his neck into his head and into the top of the shoulder blade on the left side. He states that his present occupation of welding above his head increases and aggravates the discomfort.

"X-Ray Pictures: X-ray pictures have not been examined but are reported by phone to be negative.

"Diagnosis: Sprain involving the cervical dorsal junction.

"Comment: I believe that this man sprained his neck at the base and probably has a minor amount of neuritis extending into the suprascapular areas. I believe that the simplest type of treatment would be to put him on a job which does not require

extensive use of his neck and allow nature to heal the sprain without interference. He has been treated by a novocain injection with some success and I believe that this might be repeated if his complaints continue. It may be possible that if the irritative symptoms exist for an extended period, that some immobilization will be necessary, such as a plaster collar or other support. I am of the opinion, however, that if his work is so altered that he does not require prolonged and repeated hyperextension of his cervical spine that he probably will get well without a great deal of treatment.

“/s/ W. F. HOLCOMB, M.D.”—

EXHIBIT “C”

Copy of excerpt from report of Dr. H. D. Berlin, August 3, 1948:

“—Impression: Our impression is that this man suffered an injury to his head causing pain in his cervical vertebra, but due to lack of more specific findings, it would seem that he has some arthritic conditions of the cervical vertebrae that were aggravated by the injury.

“Comment: As long as he can get the type of work he can do he gets along all right, but it would appear that if he cannot get the work he is able to do he should change his line. He was advised as to treatment at home.

“/s/ H. D. BERLIN, M.D.”

[Endorsed]: Filed February 10, 1949.

[Title of District Court and Cause.]

**CERTIFICATE OF CLERK TO RECORD
ON APPEAL**

I, C. W. Galbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Complaint for Injunction Pursuant to Title 33,
U.S.C.A. Section 921.

Motion to Dismiss.

Opinion.

Order and Decree.

Notice of Appeal.

Statement of Points on Which Appellant Intends
to Rely and Designation of Parts of the Record
for the Consideration Thereof.

Deputy Commissioner's Certification of Pleadings,
Transcript of Testimony, Exhibits (A, B and C)
and Decision.

In Witness Whereof, I have hereunto set my hand
and affixed the seal of said District Court this 10th
day of August, A.D. 1950.

C. W. CALBREATH,
Clerk.

[Seal]: /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12644. United States Court of Appeals for the Ninth Circuit. Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, Appellant, vs. United Engineering Company, a Corporation, and Fireman's Fund Insurance Company, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division. Filed August 9, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for
the Ninth Circuit

No. 12644

WARREN H. PILLSBURY, Deputy Commis-
sioner, etc.,

Appellant,

vs.

UNITED ENGINEERING COMPANY, a Corpo-
ration, et al.,

Respondents.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY AND DES-
IGNATION OF PARTS OF THE RECORD
NECESSARY FOR THE CONSIDERA-
TION THEREOF

Appellant states that he intends to rely upon the
following points on appeal:

1. That the District Court erred in failing to give finality to findings of fact of the deputy commissioner supported by evidence.
2. That the District Court erred in reevaluating the evidence before the deputy commissioner, and in making different fact conclusions from those found by the deputy commissioner.
3. That the District Court misconstrued the law as to when the time for filing claim for compensation begins to run.

4. That the District Court erred in denying the motion to dismiss the complaint, and in setting aside the compensation order complained of.

5. Appellant designates the following parts of the Record as necessary for consideration of the above points.

1. Complaint.

2. Defendant's motion to dismiss complaint.

3. Opinion-order of the United States District Court dated May 10, 1950, and filed on May 11, 1950, and order and decree dated May 11, 1950, denying the motion of defendant to dismiss the complaint and vacating and setting aside the order of the defendant awarding compensation.

4. The transcript of testimony taken at the hearing before the deputy commissioner on January 31, 1949, together with the exhibits which were copied into said transcript at the end thereof.

5. Notice of appeal.

6. This notice.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ MACKLIN FLEMING,
Assistant U. S. Attorney.
Attorneys for Appellant.

[Endorsed]: Filed August 18, 1950.

[Title of Court of Appeals and Cause.]

**MOTION FOR CONSOLIDATION FOR
BRIEFING AND ARGUMENT**

In the above-entitled causes, appellant hereby moves for the consolidation thereof for purposes of briefing and argument in this court, the grounds for the motion being the existence of a common question of law pertinent to each of these causes, and a common opinion of the District Court covering the common point of law herein.

Dated August 28, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ MACKLIN FLEMING,
Assistant U. S. Attorney.
Attorneys for Appellant.

We join in the above motion.

Dated Aug. 28, 1950.

/s/ JOHN H. BLACK,

/s/ EDWARD R. KAY,

Attorneys for Appellees.

In the United States Court of Appeals for
the Ninth Circuit.

ORDER OF CONSOLIDATION

The above-entitled causes are hereby consolidated
for purposes of briefing and argument in this court.

Dated Aug. 28, 1950.

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ CLIFTON MATHEWS,
Circuit Judge.

/s/ WM. E. ORR,
Circuit Judge.

[Endorsed]: Filed August 30, 1950.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12644

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIR-
TEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S
AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION AND FIREMAN'S
FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

Appeal from the United States District Court for the Northern
District of California, Southern Division

PROCEEDINGS HAD IN THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT.

Excerpt from Proceedings of Wednesday, February 21, 1951

Before HEALY, BONE and ORR, *Circuit Judges*.

ORDER OF SUBMISSION

Ordered appeals herein argued by Mr. Reynold Colvin, Assistant
United States Attorney, counsel for appellants, and by Mr. Ed Kay,
counsel for appellees, and submitted to the court for consideration
and decision.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT.

Excerpt from Proceedings of Wednesday, March 14, 1951

Before HEALY, BONE and ORR, *Circuit Judges*.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING
OF JUDGMENTS

ORDERED that the typewritten opinion this day rendered by this
court in above causes be forthwith filed by the clerk, and that a
judgment be filed in each cause and recorded in the minutes of this
court in accordance with the opinion rendered.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12,644

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,645

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,646

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

MATSON TERMINALS, INC., A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,647

Mar. 14, 1951

ALBERT J. CYR, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

Appeals from the United States District Court, Northern District of California, Southern Division

Before HEALY, BONE, and ORR, *Circuit Judges*.

HEALY, *Circuit Judge*.

Involved here are consolidated cases, four in number, arising under the Longshoremen's and Harbor Workers' Compensation

Act, 33 USCA §§ 901 et seq. In each case the Deputy Commissioner found a partial disability growing out of injury suffered in the course of employment. In one instance (the Shallat case) the award was for permanent and in the others for temporary disability. On appropriate proceedings before the district court the awards were annulled on the ground that the claims were barred because not filed within one year after the injury as provided in § 13(a) of the Act, 92 F. Supp. 898. The Deputy Commissioner appeals.

In each case the claimant suffered a specific injury from accident on a particular date. No latent injury or occupational disease is involved. There were no voluntary payments of compensation. The claims were filed on dates ranging from 18 to 23 months after the injury. Omitting for the moment what we regard as irrelevant or argumentative matters, the Deputy Commissioner's findings were these:

No. 12,644. Claimant Johnson on May 12, 1947, struck his head on a crossbeam of a vessel while working as a welder, "sustaining extensive strain of the muscles of the neck which still continues painful." His employer continued him in lighter work in a partially disabled condition without reduction in wages until May 15, 1948. He lost no time from work as a result of the injury until about June 15, 1948. Throughout the period in question he was furnished by his employer with medical treatment. His claim for compensation was filed January 17, 1949.

No. 12,645. Claimant Curnutt, on the 18th of February, 1947, while performing services as a sheet-metal worker in ship repair operations sustained personal injury resulting in disability as follows: While lifting a heavy object, he wrenched his back. He was disabled from work for six days, after which he was continued in lighter work at full wages until his employment was terminated January 13, 1948. He did not lose wages in excess of seven days until February 5, 1948. His claim for compensation was filed January 17, 1949. Medical treatment was furnished him by the employer throughout the period.

No. 12,646. Claimant Shallat on November 21, 1947, while performing services as a longshoreman on a vessel sustained personal injury resulting in disability as follows: He caught his left hand between a sling and a bight, causing a contusion of the left hand, and exacerbation of a pre-existing progressive arthritis of the proximal joint of the second or middle finger. Apparently he lost no time because of the injury and continued at work. It does not appear from the findings whether he received medical treatment at the expense of his employer. His claim for compensation was filed May 23, 1949.

No. 12,647. Claimant Manos on December 22, 1947, while performing services as a welder in the repair of a ship, sustained personal injury resulting in disability when he was struck on top of the head by an iron bar falling from above, suffering strain of the musculature in the cervical region. Following the injury he continued at his regular occupation as a welder without loss of time or wages until January 31, 1949, at which time, because of the condition of his neck, he was forced to discontinue working as a welder and seek other and lighter employment. Throughout the employer furnished him with medical treatment. His claim for compensation was filed August 17, 1949.

The material portion of § 13(a) of the Act reads: "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, . . . except that if payment of compensation has been made without an award on account of such injury . . . a claim may be filed within one year after the date of the last payment . . ."

The Commissioner argues that the word "injury" should be construed as meaning "compensable injury." This, he says, has been the practical administrative construction of the term for a long time. He says that the interpretation is "consistent" with § 19(a), providing that a claim for compensation "may be filed . . . at any time after the first seven days of disability," and with § 6(a) providing that "no compensation shall be allowed for the first seven days of the disability . . ." He adds that unless the interpretation meets with judicial approval his office will be flooded with a load of unnecessary claims.

We may observe in passing that the injured men appear to have suffered a disability of greater or less extent from the outset. Two of them, at least, as the Commissioner found, had to be put on lighter work, and all of them confessedly continued from the time of injury to suffer pain and discomfort from it. It is true they lost no time, or none in excess of seven days anyway, and were paid their old wage, but those facts alone do not spell absence of disability for which an award may be made. See *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 9 Cir., 103 F. 2d 513, where this court sustained an award under like circumstances, saying that wages received by a worker who has suffered an injury are not conclusive and that ability to earn is the test.

But we do not, as the trial court did, rest decision on the *Twin Harbor* holding. What the Commissioner's argument really amounts to is that the statute begins to run, not from the date of the injury, but from the date of disability. The view appears irreconcilable with the plain terms of the Act. The argument necessarily assumes that the terms "injury" and "disability" are interchangeable. However, as we pointed out in *Kobilkin v. Pills-*

bury, 103 F. 2d 667, 669, the terms are separately defined in the statute and are not synonymous. Section 2(2) states that when used in the Act "the term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, . . ." In the same section (subdivision 10) "disability" is defined as meaning "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment."

In the *Kobilkin* case, *supra*, the claimant was disabled from work for a period of three weeks following his injury, for the allowable portion of which time compensation was voluntarily paid him. He then resumed his employment at the former wage and continued to work for 17 months, when his condition worsened and it was learned that his injury was more extensive than had originally been thought. Later he filed a claim. Deputy Commissioner Pillsbury disallowed it because not filed within one year from the last payment of compensation as provided in § 13(a). We upheld the ruling and the Supreme Court affirmed without opinion, 309 U.S. 619.¹ Answering an argument somewhat analogous to the one made here, we said that the injury "was inflicted at the time of the accident, not when its full extent was first noted at the later time."

The Commissioner endeavors to distinguish the holding on the ground that *Kobilkin* was off work for more than seven days in consequence of the injury and was appropriately paid compensation. If the distinction were accepted as of controlling significance a startling result would ensue, as will be seen from the following illustration: Worker A is disabled from work for eight days following his injury, and is accordingly paid compensation for the eighth day. If he fails to file a claim within a year after the payment he is forever barred. Worker B is disabled from work for but six days or less after injury, and in line with § 6(a), *supra*, is paid no compensation. According to the argument there is no time limit within which B may file a claim.

As the language of § 13(a) evidences, Congress was not unaware that there would be many cases like B's and it deliberately provided that the right to compensation in such cases would be-

¹ The *Kobilkin* case, unlike the present, may be thought to have involved a latent or undiscovered injury. It is arguable that in such cases the injury should be treated as arising when its true nature is discovered. Possibly this circumstance accounts for the four to four division among the justices when the case was disposed of in the Supreme Court.

come barred unless claim therefor is filed within one year after the injury. If it is thought desirable in the interest of justice or practical administration that a different limitation be prescribed, the power to effect the change resides in Congress, not in the courts.

The decrees of the district court in the several cases are affirmed.

(Endorsed:) Opinion. Filed Mar. 14, 1951. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12644

WARREN H. PILLSBURY, ETC., APPELLANT

vs.

UNITED ENGINEERING COMPANY, ET AL., APPELLEES

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

(Endorsed:) Filed and entered March 14, 1951. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WARREN H. PILLSBURY, ETC., APPELLANT

vs.

UNITED ENGINEERING COMPANY, ET AL., APPELLEES

Certificate of Clerk, U. S. Court of Appeals for the Ninth Circuit, To Record Certified under Rule 38 of the Revised Rules of the Supreme Court of the United States.

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing forty-nine (49) pages, numbered from and including 1 to and including 49, to

be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of Hon. Philip B. Perlman, Solicitor General of the United States, counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 4th day of June, 1951. [SEAL.]

(S.) PAUL P. O'BRIEN,
Clerk.

In the Supreme Court of the United States

No. — October Term, 1951

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY, ET AL. (HOWARD JOHNSON
INJURY)

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY; ET AL. (FRANK S. CURNETT
INJURY)

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

MATSON TERMINALS, INC., ET AL. (LOUIS SHALLAT INJURY)

ALBERT J. CYR, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY, ET AL. (CHRIS MANOS INJURY)

Upon consideration of the application of counsel for the petitioners,

It is ordered that the time for filing petition for certiorari in the above-entitled causes be, and the same is hereby, extended to and including 11th day of August 1951.

HUGO L. BLACK,
*Associate Justice of the Supreme
Court of the United States.*

Supreme Court of the United States

No. 229, October Term, 1951

[Title omitted.]

Order allowing certiorari

Filed October 15, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below, which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.

Volume II
TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 229

**WARREN H. PILLSBURY AND ALBERT J. CYR, DEPUTY
COMMISSIONERS FOR THE THIRTEENTH COMPEN-
SATION DISTRICT, ETC., PETITIONERS**

vs.

**UNITED ENGINEERING COMPANY, A CORPORATION
FIREMEN'S FUND INSURANCE COMPANY, ET AL**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

**PETITION FOR CERTIORARI FILED AUGUST 7, 1951
CERTIORARI GRANTED OCTOBER 15, 1951**

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No. 12645

**United States
Court of Appeals**
for the Ninth Circuit.

WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act,

Appellant,

vs.

UNITED ENGINEERING COMPANY, a Corporation, and **FIREMAN'S FUND INSURANCE COMPANY**, a Corporation,

Appellees.

Transcript of Record

**Appeal from the United States District Court
Northern District of California,
Southern Division.**

NAMES AND ADDRESSES OF ATTORNEYS

FRANK J. HENNESSY,
United States Attorney.

EDGAR R. BONSALE,
Assistant United States Attorney,
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San Francisco, California,
Attorneys for Defendant and
Appellant.

JOHN H. BLACK,

EDWARD R. KAY,
233 Sansome Street,
San Francisco, California,
Attorneys for Plaintiffs and Appellees.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 28810H

UNITED ENGINEERING COMPANY, a Cor-
poration; FIREMAN'S FUND INSURANCE
COMPANY, a Corporation,

Plaintiffs,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner for the Thirteenth Compensation Dis-
trict, Under the Longshoremen's and Harbor
Workers' Compensation Act,

Defendant.

COMPLAINT FOR INJUNCTION PURSUANT
TO TITLE 32, U.S.C.A. SECTION 921

To: The Honorable District Court of the United
States, Northern District of California, South-
ern Division:

The plaintiffs, United Engineering Company, a
corporation, and Fireman's Fund Insurance Com-
pany, a corporation, respectfully show:

I.

Plaintiff, United Engineering Company, at all
times herein mentioned has been and now is a
corporation; Plaintiff Fireman's Fund Insurance
Company, at all times herein mentioned has been
and now is a corporation. Both of said corporations

have their principal offices in the City and County of San Francisco, State of California.

II.

That plaintiff Fireman's Fund Insurance Company, a corporation, at all times herein mentioned, was the Longshoremen's and Harbor Workers' Compensation insurance carrier for said United Engineering Company, a corporation.

III.

On the 18th day of February, 1947, one, Frank S. Curnutt, was in the employ of the said United Engineering Company as a longshoreman and on said date was working as such longshoreman aboard the SS "Lurline" on navigable waters of the United States at Alameda, California.

IV.

On said date and at said place, the said Frank S. Curnutt suffered an injury to his back while employed as aforesaid.

V.

That thereafter on February 20, 1947, plaintiffs herein provided medical treatment to the said Frank S. Curnutt for the said injury.

VI.

That the plaintiff United Engineering Company duly filed with defendant on March 8, 1947, a report covering said injury in accordance with Section 30

of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 930.

VII.

That no compensation payments were ever made to the said Frank S. Curnutt, or promised by said plaintiffs, or either of them.

VIII.

That on the 17th day of January, 1949, a claim for compensation was filed with the defendant Deputy Commissioner by the said Frank S. Curnutt, alleging that the said injury of February 18, 1947, first caused disability on or about January 15, 1948.

IX.

On April 8, 1949, defendant made and entered a compensation order awarding compensation payment to the said Frank S. Curnutt, as follows:

Federal Security Agency
Bureau of Employees' Compensation
13th Compensation District

Case No. 1366-1135

Claim No. 3177

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act,

FRANK S. CURNUTT,

Claimant,

against

UNITED ENGINEERING COMPANY,

Employer,

FIREMAN'S FUND INSURANCE COMPANY,

Insurance Carrier.

**COMPENSATION ORDER
AWARD OF COMPENSATION**

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

Findings of Fact

That on the 18th day of February, 1947, the claimant above named was in the employ of the employer above named at San Francisco harbor, in the State of California; in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Fireman's Fund Insurance Company; that on said day claimant herein, while performing service for the employer as a sheet-metal worker and engaged in ship repair operations on a completed vessel on navigable waters of the United States at said harbor, sustained personal injury arising out of and in the course of his employment and resulting

in disability as follows: while lifting a heavy object, he wrenched his back; that defendants at the first and only hearing herein asserted the contention that the claim was barred by the period of limitations described by said act; that no compensation has been paid for said injury; that the claim for compensation was filed herein on January 17, 1949, that the employer submitted to the Deputy Commissioner its first report of injury in this matter on or about March 8th, 1947; that claimant was continued in lighter work and full wages by the employer after a disability and loss of working time of six days, until his employment was terminated on January 13, 1948, and that claimant did not lose wages in excess of seven days as a result of his injury until February 5th, 1948, that the employer had knowledge at intervals throughout the entire period from February 18, 1947, to the present time that claimant was suffering distress as a result of said injury, and that the employer provided medical treatment for him therefor during said period, that therefore the claim for compensation is not barred by the period of limitations prescribed by said Act; that claimant has not incurred expense for medical treatment to date; that claimant is entitled to further medical care from time to time as needed to cure or relieve him from the effects of his injury, to be provided by defendants; that the average weekly earnings of the claimant herein at the time of his injury amounted to the sum of \$66.80; that from February 2nd, 1948, to and including November 8th, 1948, claimant lost wages on 37 scattering days in reporting to defendants' physicians for medical

care, and for a period of five weeks in June-July, 1948, in which he laid off from work as a therapeutic measure and in the hopes of recovering his health thereby; which period was approved by his physicians for said purpose; that he is entitled to compensation for 10 $\frac{2}{7}$ weeks for said period of disability amounting to \$257.14, no part of which has been paid; that claimant is still in a partially disabled physical condition as a result of his injury but has not established further loss of wage earning capacity to this time as a result thereof; that claimant's attorney, Joseph E. Smith, has rendered legal service to claimant in the prosecution of his claim for which a fee is approved in the sum of \$50.00, and lien granted therefor upon compensation herein awarded;

Upon the foregoing facts the Deputy Commissioner makes the following:

Award

That the employer, United Engineering Company, and the insurance carrier, Fireman's Fund Insurance Company, shall pay to the claimant compensation as follows:

To claimant the sum of \$257.14 forthwith, less however the sum of \$50.00 to be deducted therefrom and paid to claimant's attorney, Joseph E. Smith, upon his lien for attorney's fee.

Given under my hand at San Francisco, California, this 8th day of April, 1949.

WARREN H. PILLSBURY,
Deputy Commissioner, 13th
Compensation District.

Every payment awarded under a Compensation Order earns 20% additional if not paid within 10 days from the date it becomes due.

X.

That the evidence in the hearing before the said defendant is without conflict that the said Frank S. Curnutt sustained injury on the 18th day of February, 1947, that he received medical treatments therefor and that no compensation payments were made or promised to the said Frank S. Curnutt by the plaintiffs, or either of them.

XI.

That no claim for compensation was filed with the Deputy Commissioner by or on behalf of the said Frank S. Curnutt until more than one year after the injury of February 18, 1947, to wit: January 17, 1949.

XII.

That prior to the first hearing on said claim, plaintiffs pleaded that said claim was barred by the period of limitations prescribed by the said Longshoremen's and Harbor Workers' Compensation Act.

XIII.

That by the said Compensation Order of April 8, 1949, the plaintiffs herein are ordered to pay to the said Frank S. Curnutt the sum of \$257.14, less the sum of \$50.00 payable to claimant's attorney as attorney's fee.

XIV.

Plaintiffs are informed and believe, and upon such information and belief, allege that the said Frank S. Curnutt, claimant in the said proceedings before the defendant Deputy Commissioner, to whom compensation payments are ordered to be paid as aforesaid, is a person of no financial means and without property, and if plaintiffs should pay to him the sum awarded in said Compensation Order, they could not be recovered back and that accordingly plaintiffs will suffer great and irreparable damage and injury if said award and order is not stayed.

XV.

The said claim for compensation was not filed with the Deputy Commission until January 17, 1949, although the Deputy Commissioner found that claimant lost wages on 37 scattering days from February 2, 1948, to and including November 8, 1948, and a period of five weeks in June-July, 1948. The claim was, therefore, not filed until over eleven months after disability is first alleged to have resulted from the said injury. The defendant's award therefore has placed plaintiffs in the position of being required to pay a lump sum of money covering a period extending eleven months prior to the time claimant filed his claim for compensation.

XVI.

Plaintiffs are informed and believe that an early

date for a hearing on the merits of this matter can be had before this Honorable Court.

XVII.

Plaintiffs believe that there is a great probability that the said Compensation Order of the defendant will be set aside by this Court on the ground that said defendant had no jurisdiction to issue such Order in view of the uncontradicted evidence that the said claim was filed more than one year after the date of said injury.

Wherefore, plaintiffs pray that said Compensation Order and Award be set aside and the same and its enforcement be permanently enjoined and restrained; that in addition said compensation order may be suspended and that an order be entered for an interlocutory injunction suspending the same during the pendency of this action; that payments required by said order and award and each of them be stayed until final decision herein; and that this Court may find and adjudge that the said claim for compensation was filed more than one year after the said injury and that, therefore, the said Frank S. Curnutt's right to compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act is barred; and that plaintiffs should not be, nor is either of them subject to or liable to pay compensation because of the said injury to the said Frank S. Curnutt; and that said claim is not within the jurisdiction or power of defendant to administer or apply as against either

plaintiff; and for such other and further relief as to the Court may seem just.

JOHN H. BLACK,

EDW. R. KAY,

Attorneys for Plaintiffs United Engineering Company and Fireman's Fund Insurance Company.

United States of America,

Northern District of California,

City and County of San Francisco—ss.

George Jordan, being first duly sworn, deposes and says:

That he is one of the officers, to wit, Vice President of the Fireman's Fund Insurance Company, a corporation, one of the plaintiffs herein; that he has read the foregoing Complaint for Injunction Pursuant to Title 33, U.S.C.A. Section 921, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters set forth therein upon information and belief, and as to these matters he believes it to be true.

/s/ GEO. JORDAN.

Subscribed and sworn to before me this 26th day of April, 1949.

/s/ LAURNA L. MACHUGH,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires January 15, 1952.

[Endorsed]: Filed April 27, 1949.

[Title of District Court and Cause.]

MOTION TO DISMISS

Now comes the defendant, Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission, by his attorney, Frank J. Hennessy, United States Attorney, and Edgar R. Bonsall, Assistant United States Attorney, for the Northern District of California, and moves this Court to dismiss the Bill of Complaint after review of the Compensation Order filed herein, for the following reasons:

(1) That the Bill of Complaint filed herein does not state a cause of action, and does not entitle plaintiff to any relief, nor does the said Bill of Complaint state a cause of action against the defendant, Warren H. Pillsbury, Deputy Commissioner, upon which relief can be granted.

(2) That it appears from the Bill of Complaint including the transcripts of testimony taken before the Deputy Commissioner in the Compensation Order filed by him on April 8, 1949, complained of in the Bill of Complaint, was supported by evidence, and under the law said findings of fact should be regarded as final and conclusive.

(3) That it appears from the Bill of Complaint, including said transcripts of testimony, that said Compensation Order complained of herein is in all respects in accordance with law.

(4) For such other good and sufficient reasons as may be shown.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ EDGAR R. BONSALE,
Assistant United States Attorney, Attorneys for
Defendant Warren H. Pillsbury.

This motion will be based on the complaint and pleadings now on file in this matter and the certified copy of the transcript of the proceedings in the case before Deputy Commissioner Warren H. Pillsbury now filed in this court.

[Endorsed]: Filed October 14, 1949.

In the United States District Court for the Northern District of California, Southern Division

No. 28810-Civil

UNITED ENGINEERING COMPANY, a Corporation, et al.,

Plaintiff,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, etc.,

Defendant.

Appearances:

JOHN H. BLACK,
EDWARD R. KAY,
233 Sansome Street,
San Francisco, California,
Attorneys for Plaintiffs.

FRANK J. HENNESSY,
United States Attorney.

EDGAR R. BONSALE,
Assistant United States Attorney.

MACKLIN FLEMING,
Assistant United States Attorney,
San Francisco, California.
Attorneys for Defendants.

OPINION

Goodman, District Judge.

In these four consolidated actions, the plaintiff employers and their respective insurance carriers have asked this court to set aside and enjoin the enforcement of Compensation Orders and Awards made by the Deputy Commissioner pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 USC 901-950. The question presented is whether the Deputy Commissioner lacked jurisdiction to make the awards because the claims for compensation were not filed within a year after the claimants were injured as is allegedly required by Section 13(a) of the Act. The Deputy Commissioner has moved to dismiss the complaints on the ground that the claims were timely filed and that therefore the awards were proper.

Section 13(a) of the Act provides that "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefore is filed within one year after the death, except that if payment of compensation has been made, without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred." (Emphasis added.)

For a proper understanding of the issues presented, a brief account of the injuries suffered by

the claimants and the events leading up to the compensation awards is here necessary.

Claimant Howard Johnson on May 12, 1947, struck his head on a cross-beam of the vessel Monterey while working as a leaderman welder. The muscles of his neck were severely strained and he was unable to continue to weld aboard ship. His employer transferred him to lighter work in the machine shop at no reduction in wages. Although his neck continued to trouble him, he continued to work regularly for more than a year until he was discharged by the new owner of the ship yards because he was unable to weld aboard ship. Since that time he has been employed only intermittently because he is physically able to perform only the less strenuous types of welding operations. When Johnson first lost time from work, he was told it was too late for him to file a claim for compensation. But when he discovered how many employment opportunities were lost because of his condition, he decided to attempt to secure compensation. On January 31, 1949, more than a year and a half after the accident, he filed his claim with the Deputy Commissioner.

Claimant Frank Curnutt on February 17, 1947, while employed as a sheetmetal worker aboard the S. S. Lurline, wrenched his back when he lifted a pre-heater from the deck to a table. He did not work for several days. When he returned to his job, he was relieved of all heavy work on doctor's orders. With some discomfort, he performed lighter duties at his former wage rate until his job ended

in about a year. After resting for two weeks to give his back a chance to heal, he obtained work with the Bethlehem Steel Company. In June of 1948, he quit work for five weeks, as a therapeutic measure suggested by his physician. In July he went to work for a sheet-metal company, but soon was forced to give up this job, and subsequent ones, because the work proved too strenuous. On January 17, 1949, nearly two years after injuring his back, Curnutt filed his claim for compensation.

Claimant Louis Shallat on November 21, 1947, while working as a stevedore aboard the S. S. Mauna Lei, caught his hands between a sling and a bight. Considerable pain and swelling in his hands resulted. According to Shallat, his left hand has pained him continuously since it was injured and he has applied self-treatment. While he testified at the hearing before the Deputy Commissioner that the injury grew "more and more severe," he also stated that "the left hand is still the same as it was when I got injured." Shallat had lost no time from work up to the date of the final hearing before the Deputy Commissioner. At that hearing, Shallat stated that he did not file his claim for compensation until May 23, 1949, nearly a year and a half after he was injured, because he thought the injury "wasn't so serious," and that "it would work its way out."

Claimant Chris Manos was welding on the deck of the tanker Purisima on December 22, 1947, when he was struck on the head by an iron saddle falling from above. He was instructed by the examining

physician not to weld thereafter and consequently was given lighter work by his employer. He suffered no reduction in rating or wages. About two months later his employment terminated as a result of a general reduction in the number of men employed at the ship yard. In a week or so he obtained a shop welding job at a slightly higher wage than he had previously received at the ship yard. This job ended in January of 1949, due to a general lay off. At the time of the hearing before Deputy Commissioner on August 29, 1949, Manos was still unemployed, but was planning to engage in sales work. Manos' neck has troubled him continually since he was struck on the head and he has received regular medical treatment. In some respects the condition of his neck apparently gradually has improved and in others it has grown worse. Manos filed a claim for compensation on August 17, 1949, more than a year and a half after he was injured.

The Deputy Commissioner justified his awards to these claimants and now grounds his motion to dismiss these complaints on his conclusion that Section 13(a) of the Compensation Act sets the one-year period of limitation running, not from the date of injury, but from the date on which the injury became compensable. There may be merit to this interpretation of Section 13(a) but these causes can be determined without reaching the question.

In my opinion, the Deputy Commissioner erred in assuming that the injuries suffered by these claimants were not compensable so long as they con-

tinued to work with no reduction in wages. It is now settled law in this Circuit that a claimant is not precluded from recovering compensation under the Act because he has been paid his old wages at all times since resuming work after being injured. *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 F.2d 513 (1939). *Accord, Luekenbach S. S. Co. v. Norton*, 96 F.2d 764 (3 Cir. 1938); *Hartford Accident and Indemnity Co. v. Hoage*, 85 F. 2d 420 (App. D. C. 1936). The Act says nothing about "compensable injuries" but only provides that compensation must be paid for disability. Disability is defined by Section 2(10) as "incapacity because of injury to earn wages which the employee was receiving at the time ~~of~~ injury in the same or any other employment." The statute makes earning capacity the test. Earning capacity may be properly defined to mean ability to earn, rather than wages actually received. And this means ability to earn in the open labor market, not ability to secure exceptional consideration from a sympathetic employer.

Although their employers did not reduce their wages, claimants Johnson, Curnutt, and Manos were physically unable, following their injuries, to perform the same duties they had previously performed. Pain and suffering were continuous. They were well aware that unless there was improvement in their physical condition, they would be unable to again engage in strenuous activity. Claimant Manos admitted that he was told by the physician, who examined him following his injury, that he could obtain compensation. Instead of doing so, at the same physician's suggestion, he sought and ob-

tained from his employer lighter work at his former wages.

Claimant Shallat apparently continued to perform the same duties following his injury as he had before. But, if his statements to examining physicians are accepted as true, he was in constant pain. The Compensation Act does not deny relief to an injured workman until his pain exceeds endurance.

All four of the present claimants have been disabled within the meaning of the Longshoremen's and Harbor Workers' Compensation Act since the day they were injured. Consequently they had compensable claims.¹ Such claims were not timely filed. It follows that the awards of the Deputy Commissioner were not within his power to make. The court is aware of the well established rule that the Deputy Commissioner's findings of fact should not be disturbed if there is any substantial evidence to support them. But his conclusion that these claimants suffered no disability until long after they were injured is based on an error of law. The undisputed factual record shows that the earning capacity of these men was impaired from the time of injury.

The delay in the filing of these claims is wholly understandable. None of these claimants appear to have been fully aware of his rights and obligations under the Compensation Act. And, even had these men realized the consequences of delay, it is only natural that they should hesitate to jeopardize their

¹See *Liberty Mutual Insurance Co. v. Parker*, 19 F. Supp. 686 (Md. 1937) in which the same conclusion was reached on somewhat similar facts.

opportunity to continue working at their former wage rate by pressing claims for compensation. In a relatively short time the wages of these claimants would have equaled the maximum awards they could ever hope to receive. These, however, are considerations for the lawmakers and not for the Courts.

The motions to dismiss are denied and the awards are severally set aside and vacated.²

Dated May 10, 1950.

[Endorsed]: Filed May 11, 1950.

²The above order in fact fits the issues raised by the pleadings. But in order to technically comply with the rule announced by our Court of Appeals in *Twin Harbor Stevedoring & Tug Co. v. Marshall*, supra, the causes are transferred to the Admiralty docket, the motions will be treated as exceptions and are overruled and a decree will enter vacating and setting aside the awards.

In the United States District Court for the Northern District of California, Southern Division

No. 28810

UNITED ENGINEERING COMPANY, a Corporation, et al.,

Plaintiff,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, etc.,

Defendant.

ORDER AND DECREE

In the above-entitled case the motion to dismiss is denied and the award is severally set aside and vacated.

It is further ordered that the above-entitled case is transferred to the Admiralty docket, the motion will be treated as exception and is overruled and a decree is hereby entered vacating and setting aside the award.

Dated at San Francisco, California, this 11th day of May, 1950.

/s/ LOUIS E. GOODMAN,

United States District Judge.

(As amended by order of August 23, 1950.)

[Endorsed]: Filed May 11, 1950.

[Title of District Court and Cause.]

—NOTICE OF APPEAL

Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, defendant in the above-entitled action, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final order of this Court filed on May 11, 1950, denying the motion of the defendant to dismiss the complaint and vacating and setting aside the order of the defendant awarding compensation dated April 8, 1949.

Dated: July 3, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ EDGAR R. BONSALE,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed July 3, 1950.

United States Federal Security Agency
Bureau of Employees Compensation

Before: Warren H. Pillsbury,
Deputy Commissioner, 13th Compensation
District.

Case No. 1366-1135

Claim No. 3177

FRANK S. GURNUTT,

Claimant,

vs.

UNITED ENGINEERING CO.,

Employer,

FIREMAN'S FUND INSURANCE CO.,

Insurance Carrier.

TRANSCRIPT OF TESTIMONY
AT HEARING

January 31, 1949

Pursuant to notice, this matter was heard before Warren H. Pillsbury, Deputy Commissioner, Bureau of Employees Compensation, at the Coroner's Court, at 480 Fourth Street, Oakland, California, on Monday, the 31st day of January, 1949, at 10:30 a.m.
Appearances:

Claimant present in person and represented by Joseph E. Smith, attorney; accompanied by Mr. Child, representative, Sheet Metal Workers Union.

Defendants represented by B. W. Greenough, claims superintendent.

L. P. Smith, Reporter.

Mr. Pillsbury: Hearing on claim for compensation. Claimant states that his attorney, Joseph E. Smith, is coming. Apparently, he has been detained. To save time, as I have other cases on the calendar, I will note the preliminary matters to be taken up, and then wait for Mr. Smith's appearance.

In this matter, the claim is for an injury of February 18, 1947, to the back, the injury being considered at the time not to involve loss of over one week's time from work. No compensation was paid. The claim was filed January 17, 1949. The matter came to my attention on a letter from Mr. Smith, claimant's attorney, of December 23, 1948, asking that the matter be taken up for conference or hearing. Informal conference was held at Oakland on January 10, at which time no agreement was reached, and arrangement made for filing a formal claim. The matter now comes on for hearing on said claim.

Mr. Greenough, what is defendant's position, for the record?

Mr. Greenough: We raise the issue of nature and extent of disability, liability for compensation and medical expense and plead the claim is barred by the statute of limitations.

Mr. Pillsbury: I have the following medical reports in my file which are exhibited for introduction in evidence: [2*]

Report of Dr. Donald D. Lum, of Alameda, of February 20, 1947, received as Exhibit "A";

Report of Dr. V. C. Stehr, of May 18, 1948, Exhibit "B";

Report of Dr. V. C. Stehr, of June 21, 1948, Exhibit "C";

Report of Dr. Paul L. Jones, of July 19, 1948, Exhibit "D";

Report of Dr. V. C. Stehr, of October 28, 1948, Exhibit "E";

Report of Dr. Geo. J. McChesney, of November 26, 1948, Exhibit "F";

Have you any further medical reports, Mr. Greenough?

Mr. Greenough: No, I haven't, Mr. Pillsbury.

Mr. Pillsbury: Have you given copies of these reports to claimant's attorney?

Mr. Greenough: Yes, I have.

Mr. Pillsbury: We will suspend.

Reconvened on arrival of Joseph E. Smith, Claimant's attorney.

Mr. Pillsbury:

The Following Facts Are Agreed to By the Parties:

1. That claimant Frank S. Curnutt was in the employ of defendant United Engineering Company at Alameda, California, on and about February 18, 1947, as a sheet metal worker, and at said time said employer was insured against liability under the

Longshoremen's and Harbor Workers' Compensation Act by insurance in defendant Fireman's Fund Insurance Company; [3]

2. That claimant was injured on said date, said injury occurring in the course of ~~of~~ and arising out of his employment;

3. That medical treatment was furnished to some extent by defendants;

4. That claimant's average earnings at said time may be taken at \$66.80 a week, not including overtime for which there is no record available at the present moment;

5. That no compensation has been paid;

6. That claimant was performing service at said time if ship repair work on a vessel on navigable waters of the United States, and the claim is within the provisions of said act.

The Issues Are:

1. Nature and extent of disability;

2. Liability for medical expense;

3. Whether the claim is barred by the period of limitations prescribed by the Longshoremen's and Harbor Workers' Compensation Act.

Mr. Pillsbury: Any other issues, Mr. Greenough?

Mr. Greenough: No.

Mr. Pillsbury: On the matter of limitations, the record may show that my file contains only one employer's report of injury, which is dated March 7, 1947, and was received in my office December 28, 1948. [4]

Mr. Smith: Does that indicate that your office did not get notice of the claim until December 28?

Mr. Pillsbury: I cannot be sure about it because we have had some difficulty with filing of no lost time reports and my file does not indicate whether such reports for 1947 have been searched carefully at this time or not. However, none is in the file of the present case. The no lost time reports are not made up and given numbers as they are received, but are filed in bundles and eventually moved to our dead storage space.

Mr. Greenough, you have a witness who desires to get away?

Mr. Greenough: Yes, Mr. Gaughran.

JAMES A. GAUGHRAN

having been first duly sworn, testified as follows:

By Mr. Pillsbury:

Q. Your name, please?

A. James A. Gaughran.

Q. You are an attorney? A. Yes.

Q. Were you in February, 1947, representing the United Engineering Company? A. Yes.

Mr. Pillsbury: What is the purpose of this testimony, [5] Mr. Greenough?

Mr. Greenough: To show the copy of this Form 202 was mailed to Mr. Gaughran's office.

Mr. Pillsbury: What inference do you draw from that?

Mr. Greenough: I draw the inference that the

(Testimony of James A. Gaughran.)

original was mailed the same time to your office.

Q. (By Mr. Pillsbury): Mr. Gaughran, did you receive a copy of the employer's first report of injury to Frank S. Curnutt of February 18, 1947?

A. Yes, I did.

Q. When did you receive it?

A. It was received in our office March 10, 1947.

Q. Let me see it. The document seems to be identical with the same dated March 7, and filed in my office December 28, 1948.

Mr. Pillsbury: Any other questions?

Mr. Greenough: No.

Mr. Smith: I have no objection to the man's testimony only for the fact that his office allegedly received a copy on March 10, 1947. Now what conclusions—

Mr. Pillsbury: The testimony does not apply unless connected up with the original copy sent to my office. That is all, Mr. Gaughran. Thank you. Anything else?

Mr. Greenough: I would offer it in evidence if I could withdraw it for copies. [6].

Mr. Smith: I object to it as being incompetent, irrelevant and immaterial.

Mr. Greenough: I think possible for the purpose of signature it would be well to admit it.

Mr. Pillsbury: I will withhold ruling until some evidence comes in to connect it up.

ELLA BETTENCOURT

having been first duly sworn, testified as follows:

Q. Your address?

A. 215 Market Street.

Q. By whom are you employed?

A. Matson Navigation Company and United Engineering Company.

Q. Were you employed by them on February 18, 1947?

A. Yes.

Q. In what capacity?

A. Stenographer in the insurance department.

Mr. Pillsbury: Take the witness, Mr. Greenough.

Q. (By Mr. Greenough): Miss Bettencourt, in your position is it part of your duties to prepare forms for the Federal Security Agency in connection with injuries of United Engineering and Matson employees?

A. Yes. [7]

Q. One of those forms is a Form 202?

A. Correct.

Mr. Pillsbury: That Form 202 is the form I have referred to as employer's first report of injury.

Q. (By Mr. Greenough): How many copies do you make?

A. Original and two.

Q. What is the procedure?

A. The original to Mr. Pillsbury's office, one copy to the Fireman's Fund and one copy for our file.

Q. By Fireman's Fund you mean Mr. Gaughran's office?

A. Yes.

(Testimony of Ella Bettencourt.)

Q. Have you examined your file in this matter of Mr. Curnutt? A. I have.

Q. Did you find a copy of Form 202?

A. I found one carbon copy.

Mr. Pillsbury: Of what date?

A. Of March 7.

Q. (By Mr. Greenough): Is this the copy?

A. Yes (indicating copy previously offered in evidence).

Q. This is not the copy that was offered in evidence. It is an unsigned copy for my file. Is this the only copy your file contains?

A. Yes, it is. [8]

Q. Now, the date March 7, 1947, on the left hand corner, what does that indicate?

A. That indicates the date the report was made out and mailed.

Q. Is it your practice to mail the reports the same day they are made?

A. I mail them daily.

Q. (By Mr. Pillsbury): Did you *always* at that time mail a copy to me at the time that you mailed the copy to the insurance company's attorney?

A. Yes.

Q. (By Mr. Greenough): How long have you worked in your present occupation?

A. Over six years.

Mr. Greenough: That is all.

Q. (By Mr. Smith): You don't specifically remember making out a report on Mr. Curnutt?

(Testimony of Ella Bettencourt.)

A. I cannot remember definitely that far back.

Mr. Smith: That is all.

Mr. Pillsbury: I will have a search made through our no lost time files for 1947 to see if the Curnutt report can be found and will forward the parties a statement of the clerk in my office who will make such search as to what is found. I will receive the report offered a few minutes ago by Mr. Greenough as Exhibit "G".

Mr. Smith: Is that report received in evidence for identification only at this time?

Mr. Pillsbury: No, I think it can be received fully for what it may be worth.

FRANK S. CURNUTT

claimant, having been first duly sworn, testified as follows:

By Mr. Pillsbury:

Q. What is your full name?

A. Frank Samuel Curnutt.

Q. Your address?

A. 428 Spring Street, Apartment 1-A, Richmond.

Q. Your occupation?

A. Sheet metal worker.

Q. You were working, were you, for United Engineering Company on February 18, 1947, on the S.S. "Lurline"?

A. Yes, sir.

Q. Did you meet with an accident at that time?

A. I did.

(Testimony of Frank S. Curnutt.)

Q. What happened to you?

A. I was picking up what is called a pre-heater that goes in the stateroom, and I just picked it up off the deck which was 30 inches high and set it on the table approximately this high in front of me, and in that twisting position snapped something in my back, and it was about 30 [10] minutes before quitting time, if that is of any interest to you, and I did not report it that day. By the time I got home I was so sick the fellow I was riding with, I told him to tell the supervisor I wouldn't be there the next day, and the next day I went in, and they sent me over to the hospital, and I went over to Dr. Jones in Dr. Lum's office, and I was off four more days after that.

Q. Dr. Lum's report is dated February 20th, but I don't find the date given on which you reported to him. It would be either the 19th or 20th?

A. It would be the 20th. This (indicating on report) is the day I was injured and I stayed home in bed the next day.

Q. Line 14 of Exhibit "A," date of first treatment, February 20, 1947. Did you lose more than seven days time from work on account of this injury at that time?

A. Not at that time, no, I didn't because when I went in that second day the doctor there at the hospital in the yard insisted that it would be better for me if I continued working, but I felt so bad—

Q. Did you continue working?

(Testimony of Frank S. Curnutt.)

A. Well, I missed four days, missed one, worked one, missed four, and then reported back.

Q. How long did you continue working after that? A. Nearly a year after that. [11]

Q. Then what happened?

A. I was going to say in the time that I come back there the doctor said, "You must not do heavy work." So my supervisor understood that, so I was specially relieved of all heavy work.

Q. When did you next lose time from this injury?

A. I was on swing shift and I was terminated, well, in January of 1948, and so my back—I didn't go to work because my back was bothering me so much, so I took off two weeks.

Q. Well in January, 1948, did your employment cease?

A. Well, I cannot say exactly but I think it was around the 14th or 15th of January of 1948, because I think I drew one full check and a partial check.

Mr. Pillsbury: Mr. Greenough, can you verify the date from your records?

Mr. Greenough: Our records show that it was the 13th.

A. It could be, somewhere. I knew I drew one full check in January.

Q. (By Mr. Pillsbury): Was there any change in your condition at that time?

A. I couldn't say. There was none for the better or worse. It continued static.

Q. When did you next go to work?

(Testimony of Frank S. Curnutt.)

A. As I say, I was off two weeks. Then in the meantime [12] I contacted his office, but around the first of February, maybe the latter part of January or the first of February, I went to work for Bethlehem Steel Company in San Francisco and I worked there.

Q. Were you disabled from labor on account of your condition between January 13, 1948, and the time you went to work for Bethlehem Steel?

A. No, I wasn't other than just a great discomfort when I worked at any time, on account it hurts me when I stoop over or reach with my hands above my head.

Q. How long did you work at Bethlehem?

A. Somewhere from the first of February until the 15th or 14th of June, I believe, 1948.

Q. What have you been doing since then?

A. If you mind a little history in there, my back was bothering me so bad I went to Dr. Lum and Jones and Stehr and they suggested—I told them I wanted to take a vacation and see if inactivity would improve my back any, so I took five weeks vacation and got Mr. Greenough's consent. It was agreeable to him. The doctors thought it might help. One of the doctors even suggested after I came back and went to work, I came back in July, about the 17th or 18th, I took another job and I worked on that—

Q. With what employer?

A. Glen Moore Sheet Metal, East Oakland. I worked [13] there until September 24th, when this stomach trouble come up at that time.

(Testimony of Frank S. Curnutt.)

Q. You had some stomach ulcers about that time?

A. Yes, and during the time I worked for this sheet metal company out there my back bothered me very bad. The parties I was working with can substantiate that fact.

Q. That was what time?

A. That was between approximately July 15th and September 24, 1948.

Q. According to the medical file placed in evidence, you reported to Dr. Stehr on April 26, 1948?

A. Yes.

Q. That was the first time you sought medical treatment after your termination?

A. No. Mr. Greenough has a file. Here is all the treatment I took at Dr. Jones and Dr. Lum.

Q. Here is a list of a number of treatments with dates, and you are offering this in evidence, are you?

Mr. Smith: I am offering no objection from counsel.

Q. (By Mr. Pillsbury): This is a list from the office of Dr. Lum and Dr. Jones?

A. I got that from Dr. Lum and Jones. I went over and requested it. They typed it and sent it to me through the mail.

Mr. Smith: I notice it states here—probably it should [14] be 1947 rather than 1948.

Mr. Pillsbury: Yes.

A. That is right. There is no record there of my 1947 other than the first one.

(Testimony of Frank S. Curmatt.)

Q. (By Mr. Pillsbury): How many treatments did you get in February, 1947?

A. They don't have it down there. I don't know why.

Q. You tell me according to your memory how many times did you go to Dr. Lum's office in February and March, 1947?

A. I went twice a week.

Q. How many times did you go?

A. I went twice a week for approximately a month, and then he said that he thought once a week.

Q. I am speaking now commencing with February 20, 1947?

A. That is right. That is February, and he kept treating me with diathermy and back injections.

Q. They have only noted one visit in February, 1947, according to this report?

A. I notice that on there, but I don't know why they did.

Mr. Pillsbury: Received in evidence as Exhibit "H."

Q. Did your back get worse in January or February 1948?

A. I wouldn't say that it got worse.

Q. Why did you go back to the doctor for more treatment, apparently, commencing January 16, 1948? [15]

A. When Dr. Jones was treating me, that is who gave me the treatment instead of Dr. Lum, they were both in the same office, he said he didn't think further treatment—

(Testimony of Frank S. Curnutt.)

Q. Why did you go back for treatment in January, 1948?

A. Because my back was bothering me very bad. It did continue all that time.

Q. Had it gotten worse up to January 16, 1948?

A. It hadn't gotten worse since I first got hurt, but it didn't improve any after the first two months.

Q. After the first two months, that is, after about April, 1947, did your back get any worse in January, 1948, than it was from April to January?

A. No, it continued just about the same.

Q. Then why did you go back for more treatment commencing January 16, 1948?

A. The reason I went back for more treatment was that, as I told you, they put me on work that was very light where I didn't have to do very strenuous work. Then I knew it was going to be terminated and I knew I couldn't go to an outside job and do my regular sheet metal work, which is hard work, and I went back to Dr. Jones, and he sent me to Dr. Greenough and convinced them that my back was still hurting, and they re-opened the case for further treatment.

Q. That was about January 16, 1948? [16]

A. If I was terminated January 13th, it was before that. It must have been January 10th, or something like that, I went to him. I cannot swear to the exact date because that is just from my memory.

Q. How much time are you claiming compensa-

(Testimony of Frank S. Curnutt.)

tion for up to the present for this back in jury?

A. Well, to tell you the truth, I hadn't thought of the exact dates, or anything like that.

Q. What are you claiming now? What do you want?

A. I am claiming a disability that is still there. These men prove to me that my back is all right and which I know it isn't, regardless.

Q. What do you mean by disability?

A. Well, I mean that I am going to have to give up my sheet metal work and my present rate of pay.

Q. You claim to have a bad back?

A. That is right.

Mr. Pillsbury: Mr. Smith, what disability compensation do you understand the claim is here for?

Mr. Smith: Well, he advised me that he had lost a day every time he was examined and every time he had to report for treatment in the past year. Now, if he wishes to waive that, that is all right with me, plus the fact that he does have a disability that he needs medical treatment for. [17]

Mr. Pillsbury: Going back to Exhibit "H," may it be stipulated that the second, third and fourth dates in the column headed "1947," that the date "1948" is incorrect and should be changed to 1947?

Mr. Greenough: I don't know.

Mr. Pillsbury: On the appearance of the sheet, it would seem as if those three dates, February 24; 28 and March 6, under the caption "1947" should read 1947?

(Testimony of Frank S. Curnutt.)

Mr. Greenough: It would seem so.

Mr. Smith: Those are the examinations by Dr. Holcomb and Dr. Stehr. You might make those part of Exhibit "H."

Mr. Pillsbury: Presents list of 14 visits on bill-head of Dr. Holcomb and Dr. Stehr commencing April 26, 1948, received in evidence as Exhibit "I."

Q. (By Mr. Pillsbury): Who sent you to Dr. Holcomb and Dr. Stehr? A. Dr. Jones.

Q. And has their treatment been paid for by the United Engineering, do you know?

A. I didn't pay it. I guess it was paid by them. I never was billed for it.

Q. Was anything said to you at any time after you went back for more treatment about your rights under the compensation act? Was there any discussion?

A. Not by the doctors there, no sir. [18]

Q. You say you called on Mr. Greenough here before you went back to Dr. Lum in January, 1948?

A. No, I went to Dr. Lum and Jones, I seen Dr. Jones.

Q. Who did you speak to for the employer before you went back to them?

A. I went to them first and he sent me to Mr. Greenough.

Q. And in your conversation with Mr. Greenough was anything said about compensation or keeping your case open?

A. Well, I don't remember that there ever was.

Q. Did you ask for compensation payments?

(Testimony of Frank S. Curnutt.)

A. No, I didn't because I was interested just in getting my back taken care of.

Q. Have you incurred any medical expense for medical treatment?

A. Nothing, only just the time lost on the days of examination.

Q. You haven't had to pay a doctor anything?

A. No. I trusted their doctors. I thought they were as good as I could pick myself and I trusted them.

Q. This brings your list of visits to the doctor down to November 8, 1948. Have you lost any time from work on account of your work since then to the present time?

A. No, I cannot claim that I have.

Mr. Pillsbury: Mr. Smith, do I understand correctly, [19] then, that the only contention is for a day's compensation for each time he went to the doctors up to the present time?

Mr. Smith: That is correct.

Q. (By Mr. Pillsbury): How is your back now?

A. Well, it is bothering me very much. I sleep about from 4 to 5 hours of a night and then I wake up and from then until morning I am very uncomfortable.

Q. Why did you wait so long before filing a claim for compensation?

A. Well, I was in hopes that my back could be cured, and I would be very thankful for that, and then I went over to Dr. McChesney and he was to get me the belt. I waited a month and heard nothing from him. I said, "That is the brush off

(Testimony of Frank S. Curnutt.)

from the company." I went to the Union agent and he recommended a lawyer, and he recommended Mr. Smith.

Mr. Pillsbury: Mr. Smith, any questions?

Q. (By Mr. Smith): When you first injured your back you reported to Dr. Jones, that is, the office of Dr. Lum and Dr. Jones?

A. Yes. I went to the little hospital in the yard and they sent me in their own transportation there that day.

Q. For 1947 you appear to have listed only four times [20] which you were seen by Dr. Lum and Dr. Jones. Did you go to their office for treatment more than that?

A. Yes, there was continuous treatment for, it must have been from February until, well, I wouldn't say, but I should say that should be March 6, 1947, you know; never less than once a week for that time.

Q. In other words, from February, the time you were injured until March 6th you went at least twice a week? A. I would say so.

Q. Did you go also to the yard, the little hospital in the yard, for treatment?

A. No, I would just go there to get my pass to go out to go there. That was the first few treatments and right after that I transferred to swing shift.

Q. And then you received notice that they were going to terminate your services around the middle of January, 1948? A. Yes.

(Testimony of Frank S. Curnutt.)

Q. Up to that time the company had given you light work? A. That is true.

Q. And you lost no time from work?

A. No, I hadn't.

Q. In fact, when you were off in February for a few days they paid your wages? [21]

A. No. When I was terminated.

Q. I mean right after you were hurt in February, 1947?

A. No, I received no wages only just the days I reported for work.

Q. You did not lose any time then?

A. I lost five days.

Q. Who made this note here on this side, "Wages paid; no time lost"?

A. I don't know about that. That is the first time I ever seen that copy. I don't know a thing about it.

Q. You didn't write that on there?

A. No, I never seen that copy before that. That is not the original copy, the one I gave you.

Q. Yes, I got that from our file.

A. I had seen it then, but I didn't put that on there.

Q. You did light work until your services were terminated in January, 1948? A. Right.

Q. And then you knew you were going to be terminated, so you went to Dr. Lum?

A. Yes.

Q. Why did you go to see Dr. Lum?

A. Because I knew that my back needed further attention. Dr. Jones was the one treating me. He

(Testimony of Frank S. Curnutt.)

said, "Now, I don't think further treatment at this time will help you, so you go ahead and work and try it for a few months," he said, [22] and I did. I went ahead and did just like he said. It was very easy, and at night at home I kept a hot water bottle on my back, and so it went on, and when I knew I was going to be terminated I knew I needed further treatment.

Q. (By Mr. Pillsbury): During the time you continued on lighter work until January, 1948, did you draw the same rate of pay? A. Yes, sir.

Q. (By Mr. Smith): You felt if you were going to go some place else you had to do your regular work and you could not do it?

A. That is right.

Q. Then he referred you to Mr. Greenough?

A. Yes.

Q. What did Greenough say about medical treatment or medical care? What did he say?

A. He sent me back to Dr. Jones.

Q. What did he say? What were his exact words, if you remember?

A. I cannot swear to his exact words. I really cannot, but he knew my back was injured before.

Mr. Pillsbury: What was the gist of his remarks?

Q. (By Mr. Smith): You came in and you said to him what, and what did he say to you?

A. I went and talked to him and asked him, I says, [23] "Well, I am going to be terminated over there and my back is still bothering and is just as bad as it was the first few months it was injured,

(Testimony of Frank S. Curnutt.)

and I wonder if you could go to bat for me and keep me still working for the United Engineering because I knew they were still going to have a lot of men on day shift, where swing shift was terminated." He said, "I just cannot do it because we have several men in the same condition, I would say, that you are in." I said, "My back is still bothering me." So between he and I it was agreed it was all right for me to go back to Dr. Jones for examination and treatment, which I received.

Q. He told you to go back to Dr. Jones for examination and treatment?

A. Yes, that is true.

Q. And then you kept going to Dr. Jones almost three or four times a month from January, 1948, until June or July, 1948?

A. That is true.

Q. Did the doctor ever present you with any bills at any time?

A. No, sir.

Q. (By Mr. Pillsbury): What is the last job you have worked on?

A. The last job I was working on I was working for the telephone company. [24]

Q. How long did you do that?

A. I worked from the 18th of December to the 13th of January, this year.

Q. Are you working now?

A. No, sir.

Q. You have done no work since that last job?

A. No, and if I may add something in regard to the last job, the reason I had to leave the last job is because the telephone sets were very heavy and I could not lift.

(Testimony of Frank S. Curnutt.)

Q. Are you looking for work now?

A. Sure, absolutely. I am going out on a job in the morning. I don't know what that is going to turn out.

Q. Sheet metal work?

A. It is going to be sheet metal work. I am going to get \$2.20 an hour for it.

Q. (By Mr. Smith): What are your complaints with reference to the back now? Are you able to do the same type of work you did before?

A. No, sir. If there is heavy lifting I have to give the job up.

Q. (Mr. Pillsbury): Do you get more a day now than you were getting at the time you were hurt? A. Yes, sir, the wages are increased.

Q. (By Mr. Smith): After you first saw Mr. Greenough in [25] January, 1948, have you talked to him since then?

A. Yes, I talked to him in June, 1948.

Q. What was the reason you went to see him in June, 1948?

A. I talked to the doctor. I wanted to take a little trip. They suggested that I go and get Mr. Greenough's o.k. before I took any trip that might further injure my back. He agreed it was all right. I was off five weeks on my own because I wanted to give it a chance if inactivity would help it any.

Q. Did you have any discussion at that time if anything happened on your vacation?

A. No.

Q. (By Mr. Pillsbury): What was the period

(Testimony of Frank S. Curnutt.)

of vacation? A. Approximately five weeks.

Q. When?

A. It started before the middle of June, 1948, and then I think I went back to work somewhere around the 20th of July, 1948.

Mr. Smith: There isn't any claim that the insurance company hasn't been furnishing the medical treatment?

Mr. Greenough: Not as far as I know.

A. If I might enter something, I haven't had any treatment.

Q. (By Mr. Smith): What treatment you have had the insurance [26] company has been paying for it? A. That is right, sure.

Mr. Pillsbury: There is no period of limitations on medical treatment as far as we are advised now. You should furnish any further medical treatment that would be of any value.

Mr. Greenough: Yes.

Mr. Pillsbury: I notice in Dr. McChesney's report he recommends a belt, and also that focal conditions be gone into, especially the tonsils and sinus condition. You will have that done?

Mr. Greenough: Yes, I will.

Mr. Pillsbury: Anything else?

Mr. Smith: Mr. Referee, it appears to me in such a type of situation you have here, the man has suffered no loss of time from work until approximately after he left the company and went to work for other employers, at which time he lost a day here or a day there when he needed medical treatment.

(Testimony of Frank S. Curnutt.)

Now, I think under such a situation as that, particularly when the claimant saw Mr. Greenough just about a week or two before the statute of limitations would normally run that possibly I think an obligation or duty on his part to advise him as he was leaving the company that there might possibly be the statute of limitations involved. [27]

Mr. Pillsbury: You mean that there was some estoppel?

Mr. Smith: Yes, the fact that he had been furnished treatment right along even after he saw Mr. Greenough lulled the man into a sense of security. He did not know his rights.

Mr. Pillsbury: I doubt your record shows estoppel. However, I am looking at the matter from another point of view. There are various decisions holding the period of limitations does not commence to run until the first onset of compensable disability is in effect; that is, the date the claimant was first able to claim something because his cause of action accrued. His cause of action did not accrue because there was less than seven days disability, and the time he first completed seven days of disability may have been within a year before the filing of his claim.

Mr. Greenough: I might point out in that connection he has testified his condition is the same.

Mr. Pillsbury: Compensation is payable for loss of time from work, not mere pain and suffering. Disability is loss of wages due to injury. Anything else on this case?

(Testimony of Frank S. Curnutt.)

Q. (By Mr. Smith): On these dates that you went to Dr. Jones, for treatment, you lost a whole day's work?

A. Practically all the time because I was working in San Francisco and I was taking treatments in Oakland. [28]

Q. Also Dr. Holcomb and Dr. Stehr?

A. The same proposition.

Q. That is 1948? A. Yes.

Q. (By Mr. Pillsbury): Your home at this time was where?

A. The same address, 428 Spring Street, Richmond.

Q. You went occasionally to Dr. Lum. Where is his office?

A. He is in Oakland, but most of my treatment was at Alameda.

Q. The office of Dr. Holcomb and Dr. Stehr is also in Oakland?

A. Oakland, and Dr. Jones and Lum in Oakland.

Q. (By Mr. Smith): During 1948 most of the time you were working in San Francisco, you lived in Richmond, and came to Oakland for treatment?

A. Yes, that is right.

Q. This last job you had was December 16th terminated?

A. No, it terminated January 13th.

Q. You are going to start work tomorrow?

A. Tomorrow.

Mr. Pillsbury: Mr. Greenough, do you wish to adjust his transportation expense for getting medi-

(Testimony of Frank S. Curnutt.)

cal treatment outside the record, or do you wish an order on it?

Mr. Greenough: Possibly we will adjust it out of the [29] record. It is immaterial to me.

Mr. Pillsbury: Why don't you pay him his medical expense and I will delete that from the decision.

Mr. Greenough: Yes, sir.

Q. (By Mr. Greenough): You stated that you continued to work at United after you returned in February, 1947, without losing time until you terminated? A. That is right.

Q. When you came to see me in January of 1948, you knew you were to be terminated then, did you?

A. Yes.

Q. Were you looking for other work at that time? A. No, sir.

Q. Didn't you start to look for work when your work terminated?

A. How do you want me to answer that?

Q. (By Mr. Smith): He is asking you a question. I wasn't there.

A. All right. After they terminated me I decided I would take off two weeks.

Q. On vacation?

A. Yes, I just took it off to see how my back was going to get along, and I was hesitating about going to these other places because I knew if I was put on hard work I would be checking out. [30]

Q. (By Mr. Pillsbury): Then you looked for more work? A. Yes.

(Testimony of Frank S. Curnutt.)

Q. You returned to Bethlehem?

A. I don't know the exact date.

Q. You took off two weeks in all to try to rest your back and improve it? A. Yes.

Q. Did you talk to—

A. After I came back after my five weeks vacation Dr. Stehr said, "What you need is about six weeks in a hot springs to clear your back."

Q. Did either doctor advise you to take the vacation before you took it? Did you talk to any of the doctors before you went on the vacation?

A. No, I didn't because I made that my own decision because I knew I needed it. I had to have it to continue on.

Q. But it was later approved by Dr. Lum?

A. It was approved by all doctors, including Mr. Greenough.

Q. (By Mr. Greenough): This was your vacation in June and July, 1948?

A. That is right.

Mr. Greenough: No further questions.

Mr. Smith: That is all. [31]

Mr. Pillsbury: You are entitled to claim for those two vacation periods, at least for partial disability, in addition to the days you went to the doctor for treatment commencing January, 1948. You had to take time off from work?

A. Sure.

Q. And you lost pay for that day?

A. Absolutely.

Mr. Pillsbury: Anything further?

(Testimony of Frank S. Curnutt.)

Mr. Smith: That is all.

Mr. Pillsbury: Case submitted, except I will have a member of my staff to make a further search for the employer's first report, and will notify the parties as to the results of such search.

Attorney fee requested.

I hereby certify that the foregoing is a correct transcript of the testimony and proceedings taken in the above matter at the hearing held on the 31st day of January, 1949.

/s/ L. P. SMITH,
Reporter. [32]

EXHIBIT "A"

Copy of excerpt from report of Dr. Donald D. Lum, February 20, 1947:

"6. Date of accident: 2-18-47.

"7. State in patient's own words where and how accident occurred: Wrenched back while lifting pre heater.

"8. Give accurate description of nature and extent of injury and state your objective findings: Spasm of lumbar muscles. Tenderness on palpation.

"9. Will the injury result in (a) Permanent defect? No.

"10. Is accident above referred to the only cause of patient's condition? Yes.

"1. Is patient suffering from any disease of the heart, lungs, brain, kidneys, blood, vascular system or any other disabling condition not due to this accident? No.

"12. Has patient any physical impairment due to previous accident or disease? No.

"13. Has normal recovery been delayed for any reason? No.

"14. Date of your first treatment: 2-20-47. Who engaged your services? Employer.

"15. Describe treatment given by you: Back injected with 1/2% procaine and strapped.

"16. Were X-rays taken? No.

"17. X-ray diagnosis:

"18. Was patient treated by any one else? No.

"19. Was patient hospitalized? No.

"20. Date of admission to hospital:

"21. Is further treatment needed? Yes. For how long? Unknown.

"22. Patient able to resume regular work on: No time lost.

"/s/ DONALD D. LUM, M.D."

EXHIBIT "B"

Copy of excerpts from report of Dr. V. C. Stehr,
May 18, 1948:

"* * * History: Mr. Curnutt stated in the latter part of February, 1947, while on duty for the United Engineering Company as a sheet metal worker, he was picking up a small heater weighing about 40 pounds. As he was picking up the heater, the trunk was twisted towards the right and he then attempted to lift the heater and twist towards the left. According to his statement, he felt a sudden snap in the lower portion of his back with immediate severe pain localized to the lower mid-line of his back. Inasmuch as there was one hour remaining before quitting time, he was able to complete his day's work, but the pain in the lower portion of his back became more severe and agonizing as the time progressed. The following day the back discomfort was so severe that he was unable to work. He then reported to the office of Dr. Lum and Dr. Jones of Alameda, and diathermy treatments were given at intervals of twice a week. These have been continued for a period of two months. X-rays of the lower back were made on the 16th of January, 1948. After a period of five days, he again returned to his usual occupation but continued to notice a considerable amount of pain and discomfort in the lower portion of his back. This patient was also fitted with a low back support which has not given any appreciable relief from the back discomfort. The patient states that it is primarily at night when

he attempts to rest that he has his greatest discomfort. . . .

“Present Complaints: His present complaints consist of a constant dull pain in the lower portion of the back when is aggravated primarily by standing with his arms over his head and also when the spine is flexed and extended. . . .

“X-ray Examination: The X-ray films made at the Alameda Hospital on the 16th of January, 1948, and bearing the number 55001 were reviewed. These are X-ray films which cover the lower thoracic, lumbar, and lumbosacral joint areas. They do not reveal any evidence of fracture, dislocation, or other former joint disease.

“Diagnosis: 1. Healed sprain of the superspinous and interspinous ligaments at the level of the fifth lumbar and first sacral segment with fibrosis.

“Comment: It seems very probable from the history as given by this patient and from the physical examination at the time of injury in the latter part of February, 1947, that the patient sustained a rather severe spraining injury to the interspinous ligaments of the lower portion of his back. It is my feeling that this sprain has healed with considerable scar tissue formation and it is on the basis of this that the present disability continues. I would suggest that a manipulation of the lower back be performed under sodium pentathol anesthesia and that attempts to milize this portion of his spine be carried out, further novocaine and saline injections should be of value. As is well known, injuries of this sort to the heavy ligamentous structures of the lower

portion of the back frequently cause persistent soreness and limitation of back action. The period of treatment is often times very prolonged. I do not anticipate, however that any permanent disability will result.

"/s/ V. C. STEHR, M.D."

EXHIBIT "C"

Copy of report of Dr. V. C. Stehr, June 21, 1948:

"Mr. Frank S. Curnutt was last seen in this office on June 17, 1948. He stated that following the back manipulation under sodium pentathol anaesthesia, which was performed on June 11, 1948, he was relieved of his discomfort for several days.

"At the present time, however, he continues to complain of a minor amount of discomfort in the lower portion of his back, primarily, at night after having rested for several hours. He stated, at the time of his visit, that he plans on giving up his present employment and leaving his area of the country for a period of about four weeks during which time he will visit his former home in Oklahoma City. Upon his return he will again report to this office for evaluation of his back.

"Examination at this time, does not reveal the patient to be completely disabled for work. The general condition is good. He stands erect. There is some increase in the normal lumbar lordosis. The shoulders and pelvis are level. The spine is straight. The back musculature is well developed.

There is an area of tenderness well localized to the interspinous area over the upper portion of the sacrum. The patient is able to flex his spine bringing his fingertips to the floor. Right lateral bending causes aggravation of his discomfort in the lower portion of his back. The other motions are performed in a satisfactory manner without significant complaint. Extension also causes some discomfort.

"It seems quite probable that with a month's vacation this patient will secure considerable rest and this may help in the alleviation of his back discomfort. I do not believe that any permanent disability has been sustained and that treatment must be carried on along on asymptomatic basis with the hope that the back discomfort will eventually disappear. If and when this patient is seen again, further reports will be submitted.

"/s/ V. C. STEHR, M. D."

EXHIBIT "D"

Copy of report of Dr. Paul L. Jones, July 19, 1948:

"Mr. Curnutt reported to this office July 19, 1948, after a month's vacation. He did no heavy work and continued with his exercises. The total result is now Mr. Curnutt does not have as much pain during the night but his over all condition is approximately the same. His condition is apparently at this time static and since his re-entry of the office in January, 1948, he has had a rather rigorous course of treatment including injections, continu-

ous diathermy, his desages of Vitamin B,I.M., exercises for his back, wearing of a lumbo-sacral belt, and finally stretchng of his back under anesthesia by Doctor Stehr of Oakland.

"In view of the fact there has been no definite marked relief, I do not see why we should continue the therapy in this case. We will consider this letter as the final one and close our files on this case. I am going to refer Mr. Curnutt back to Doctor Stehr for a final evaluation concerning his back injury.

"/s/ PAUL L. JONES, M. D."

EXHIBIT "E"

Copy of excerpt from report of Dr. V. C. Stehr, Oct. 28, 1948:

"* * * The clinical impression has been that of a chronic interspinous ligamentous sprain between the spinous of the 5th lumbar and 1st sacral segments. Inasmuch as there has been no admitted improvement in the condition of his back during the past year, I think it would be wise at this time to have the patient examined by some other orthopedist of your choosing for a new opinion as to his disability.

"/s/ V. C. STEHR, MD."

EXHIBIT "F"

Copy of excerpt from report of Dr. Geo. J. McChesney, Nov. 26, 1948:

"* * * Opinion: I can find nothing more than a chronic arthritis or possibly fibrositis of the lower-

most interspinous ligament as suggested by Dr. Stehr. Injections give temporary relief only. The symptoms are not really serious and I see no reason why he should not be able to resume work if he is provided with a sacro-iliac belt. The type he described, in my opinion, would not help him and has not been worn for over six months. He says he can get a job any time but he is afraid to work as the last job he had for a private firm was harder than usual. The doctor for his stomach ulcers has given his okey for return to work, according to the patient. I see no indication for any further treatment other than application of a belt. There should be complete recovery with no disability. If there is prolongation of symptoms, alleged inability to work, his focal infections should be gone into, especially as regards his tonsils and sinus condition.

"/s/ GEO. J. McCHESNEY, M. D."

EXHIBIT "G"

Not copied. Irrelevant except for date stamp on back which reads, "Receved Mar. 10, 1947, John H. Black."

EXHIBIT "H"

Copy of statement on letterhead of Dr. Donald Dyer Lum and Dr. Paul L. Jones:

(Wages paid, no time lost.)

1947

2/20/47—Back injected with procaine and strapped.

2/24/48—Diathermy to back.

2/28/48—Diathermy to back.

3/ 6/48—Diathermy to back.

1948

1/16/48—Complete physical exam.

2/ 2/48—Diathermy to back.

2/ 5/48—Diathermy to back.

2/17/48—Diathermy to back.

2/24/48—Diathermy to back.

3/ 1/48—Diathermy to back.

3/ 8/48—Diathermy to back.

3/15/48—Diathermy to back.

3/22/48—Diathermy to back.

3/26/48—Diathermy to back.

3/31/48—Diathermy to back.

4/ 2/48—Diathermy to back.

4/ 5/48—Diathermy to back.

4/ 9/48—Diathermy to back.

4/12/48—Diathermy to back.

4/16/48—Diathermy to back.

4/30/48—Diathermy to back.

5/ 7/48—Diathermy to back.

5/15/48—Diathermy to back.

5/22/48—Diathermy to back.

5/28/48—Diathermy to back

6/ 3/48—Diathermy to back.

6/18/48—Diathermy to back.

7/19/48—Diathermy to back.

EXHIBIT "I"

Copy of statement on letterhead of William F. Holcomb, M. D., and Vernon C. Stehr, M. D.:

1948

4/26/48—Exam.

6/11/48—Back mani.

6/17/48—ov.

7/20/48—ov.

8/ 6/48—ov.

8/19/48—Back inj.

8/21/48—ov.

8/28/48—ov.

9/11/48—ov.

9/25/48—ov.

9/27/48—Back inj.

10/ 6/48—ov.

10/21/48—ov.

11/ 8/48—ov.

[Endorsed]: Filed February 10, 1949.

[Title of District Court and Cause.]

**CERTIFICATE OF CLERK TO RECORD
ON APPEAL**

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Complaint for Injunction Pursuant to Title 33,
U.S.C.A. Section 921.

Motion to Dismiss.

Notice of Appeal.

Statement of Points on Which Appellant Intends to Rely and Designation of Parts of the Record Necessary for the Consideration Thereof.

Deputy Commissioner's Certification of Copies of the Pleadings, Transcript of Testimony, Exhibits (A, B, C, D, E, F, G, H and I) and Decision.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 10th day of August, A.D. 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12645. United States Court of Appeals for the Ninth Circuit. Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act, Appellant, vs. United Engineering Company, a Corporation, and Fireman's Fund Insurance Company, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: August 9, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for
the Ninth Circuit

No. 12645

WARREN H. PILLSBURY, Deputy Commis-
sioner, etc.,

Appellant,

vs.

UNITED ENGINEERING COMPANY, a Corpo-
ration, et al.,

Appellees.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY AND DES-
IGNATION OF PARTS OF THE RECORD
NECESSARY FOR THE CONSIDERA-
TION THEREOF

Appellant states that he intends to rely upon the
following points on appeal:

1. That the District Court erred in failing to
give finality to findings of fact of the deputy com-
missioner supported by evidence.

2. That the District Court erred in reevaluating
the evidence before the deputy commissioner, and
in making different fact conclusions from those
found by the deputy commissioner.

3. That the District Court misconstrued the law
as to when the time for filing claim for compensa-
tion begins to run.

4. That the District Court erred in denying the motion to dismiss the complaint and in setting aside the compensation order complained of.

5. Appellant designates the following parts of the Record as necessary for consideration of the above points.

1. Complaint.

2. Defendant's motion to dismiss complaint.

3. Opinion-order of the United States District Court dated May 10, 1950, and filed on May 11, 1950, and order and decree dated May 11, 1950, denying the motion of defendant to dismiss the complaint and vacating and setting aside the order of the defendant awarding compensation.

4. The transcript of testimony taken at the hearing before the deputy commissioner on January 31, 1949, together with the exhibits which were copied into said transcript at the end thereof.

5. Notice of appeal.

6. This notice.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ MACKLIN FLEMING,
Assistant U. S. Attorney.
. Attorneys for Appellant.

[Endorsed]: Filed August 18, 1950.

[Title of Court of Appeals and Cause.]

**MOTION FOR CONSOLIDATION FOR
BRIEFING AND ARGUMENT**

In the above-entitled causes, appellant hereby moves for the consolidation thereof for purposes of briefing and argument in this court, the grounds for the motion being the existence of a common question of law pertinent to each of these causes, and a common opinion of the District Court covering the common point of law herein.

Dated August 28, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ MACKLIN FLEMING,
Assistant U. S. Attorney.
Attorneys for Appellant.

We join in the above motion.

Dated Aug. 28, 1950.

/s/ JOHN H. BLACK,

/s/ EDWARD R. KAY,

Attorneys for Appellees.

In the United States Court of Appeals for
the Ninth Circuit.

ORDER OF CONSOLIDATION

The above-entitled causes are hereby consolidated
for purposes of briefing and argument in this court.

Dated Aug. 28, 1950.

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ CLIFTON MATHEWS,
Circuit Judge.

/s/ WM. E. ORR,
Circuit Judge.

[Endorsed]: Filed August 30, 1950.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12645

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIR-
TEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S
AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION AND FIREMAN'S
FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

Appeal from the United States District Court for the Northern
District of California, Southern Division

PROCEEDINGS. HAD IN THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

Excerpt from Proceedings of Wednesday, February 21, 1951

Before HEALY, BONE and ORR, *Circuit Judges*.

ORDER OF SUBMISSION

Ordered appeals herein argued by Mr. Reynold Colvin, Assistant
United States Attorney, counsel for appellants, and by Mr. Ed Kay,
counsel for appellees, and submitted to the court for consideration
and decision.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

Excerpt from Proceedings of Wednesday, March 14, 1951

Before HEALY, BONE and ORR, *Circuit Judges*.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING
OF JUDGMENTS

ORDERED that the typewritten opinion this day rendered by this
court in above causes be forthwith filed by the clerk, and that a
judgment be filed in each cause and recorded in the minutes of this
court in accordance with the opinion rendered.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12,644

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,645

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,646

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

MATSON TERMINALS, INC., A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,647

Mar. 14, 1951

ALBERT J. CYR, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

Appeals from the United States District Court, Northern District of California, Southern Division

Before HEALY, BONE, and ORR, *Circuit Judges*.

HEALY, *Circuit Judge*.

Involved here are consolidated cases, four in number, arising under the Longshoremen's and Harbor Workers' Compensation

Act, 33 USCA §§ 901 et seq. In each case the Deputy Commissioner found a partial disability growing out of injury suffered in the course of employment. In one instance (the Shallat case) the award was for permanent and in the others for temporary disability. On appropriate proceedings before the district court the awards were annulled on the ground that the claims were barred because not filed within one year after the injury as provided in § 13(a) of the Act, 92 F. Supp. 898. The Deputy Commissioner appeals.

In each case the claimant suffered a specific injury from accident on a particular date. No latent injury or occupational disease is involved. There were no voluntary payments of compensation. The claims were filed on dates ranging from 18 to 23 months after the injury. Omitting for the moment what we regard as irrelevant or argumentative matters, the Deputy Commissioner's findings were these:

No. 12,644. Claimant Johnson on May 12, 1947, struck his head on a crossbeam of a vessel while working as a welder, "sustaining extensive strain of the muscles of the neck which still continues painful." His employer continued him in lighter work in a partially disabled condition without reduction in wages until May 15, 1948. He lost no time from work as a result of the injury until about June 15, 1948. Throughout the period in question he was furnished by his employer with medical treatment. His claim for compensation was filed January 17, 1949.

No. 12,645. Claimant Curnutt, on the 18th of February, 1947, while performing services as a sheet-metal worker in ship repair operations sustained personal injury resulting in disability as follows: While lifting a heavy object, he wrenched his back. He was disabled from work for six days, after which he was continued in lighter work at full wages until his employment was terminated January 13, 1948. He did not lose wages in excess of seven days until February 5, 1948. His claim for compensation was filed January 17, 1949. Medical treatment was furnished him by the employer throughout the period.

No. 12,646. Claimant Shallat on November 21, 1947, while performing services as a longshoreman on a vessel sustained personal injury resulting in disability as follows: He caught his left hand between a sling and a bight, causing a contusion of the left hand, and exacerbation of a pre-existing progressive arthritis of the proximal joint of the second or middle finger. Apparently he lost no time because of the injury and continued at work. It does not appear from the findings whether he received medical treatment at the expense of his employer. His claim for compensation was filed May 23, 1949.

No. 12,647. Claimant Manos on December 22, 1947, while performing services as a welder in the repair of a ship, sustained personal injury resulting in disability when he was struck on top of the head by an iron bar falling from above, suffering strain of the musculature in the cervical region. Following the injury he continued at his regular occupation as a welder without loss of time or wages until January 31, 1949, at which time, because of the condition of his neck, he was forced to discontinue working as a welder and seek other and lighter employment. Throughout the employer furnished him with medical treatment. His claim for compensation was filed August 17, 1949.

The material portion of § 13(a) of the Act reads: "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, . . . except that if payment of compensation has been made without an award on account of such injury . . . a claim may be filed within one year after the date of the last payment . . ."

The Commissioner argues that the word "injury" should be construed as meaning "compensable injury." This, he says, has been the practical administrative construction of the term for a long time. He says that the interpretation is "consistent" with § 19(a), providing that a claim for compensation "may be filed . . . at any time after the first seven days of disability," and with § 6(a) providing that "no compensation shall be allowed for the first seven days of the disability . . ." He adds that unless the interpretation meets with judicial approval his office will be flooded with a load of unnecessary claims.

We may observe in passing that the injured men appear to have suffered a disability of greater or less extent from the outset. Two of them, at least, as the Commissioner found, had to be put on lighter work, and all of them confessedly continued from the time of injury to suffer pain and discomfort from it. It is true they lost no time, or none in excess of seven days anyway, and were paid their old wage, but those facts alone do not spell absence of disability for which an award may be made. See *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 9 Cir., 103 F. 2d 513, where this court sustained an award under like circumstances, saying that wages received by a worker who has suffered an injury are not conclusive and that ability to earn is the test.

But we do not, as the trial court did, rest decision on the *Twin Harbor* holding. What the Commissioner's argument really amounts to is that the statute begins to run, not from the date of the injury, but from the date of disability. The view appears irreconcilable with the plain terms of the Act. The argument necessarily assumes that the terms "injury" and "disability" are interchangeable. However, as we pointed out in *Kobilkin v. Pills-*

bury, 103 F. 2d 667, 669, the terms are separately defined in the statute and are not synonymous. Section 2(2) states that when used in the Act "the term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, . . ." In the same section (subdivision 10) "disability" is defined as meaning "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment."

In the *Kobilkin* case, *supra*, the claimant was disabled from work for a period of three weeks following his injury, for the allowable portion of which time compensation was voluntarily paid him. He then resumed his employment at the former wage and continued to work for 17 months, when his condition worsened and it was learned that his injury was more extensive than had originally been thought. Later he filed a claim. Deputy Commissioner Pillsbury disallowed it because not filed within one year from the last payment of compensation as provided in § 13(a). We upheld the ruling and the Supreme Court affirmed without opinion, 309 U.S. 619.¹ Answering an argument somewhat analogous to the one made here, we said that the injury "was inflicted at the time of the accident, not when its full extent was first noted at the later time."

The Commissioner endeavors to distinguish the holding on the ground that *Kobilkin* was off work for more than seven days in consequence of the injury and was appropriately paid compensation. If the distinction were accepted as of controlling significance a startling result would ensue, as will be seen from the following illustration: Worker A is disabled from work for eight days following his injury, and is accordingly paid compensation for the eighth day. If he fails to file a claim within a year after the payment he is forever barred. Worker B is disabled from work for but six days or less after injury, and in line with § 6(a), *supra*, is paid no compensation. According to the argument there is no time limit within which B may file a claim.

As the language of § 13(a) evidences, Congress was not unaware that there would be many cases like B's and it deliberately provided that the right to compensation in such cases would be

¹ The *Kobilkin* case, unlike the present, may be thought to have involved a latent or undiscovered injury. It is arguable that in such cases the injury should be treated as arising when its true nature is discovered. Possibly this circumstance accounts for the four to four division among the justices when the case was disposed of in the Supreme Court.

some barred unless claim therefor is filed within one year after the injury. If it is thought desirable in the interest of justice or practical administration that a different limitation be prescribed, the power to effect the change resides in Congress, not in the courts.

The decrees of the district court in the several cases are affirmed.

(Endorsed:) Opinion. Filed Mar. 14, 1951 Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12645

WARREN H. PILLSBURY, ETC., APPELLANT

vs.

UNITED ENGINEERING COMPANY, ET AL., APPELLEES

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On consideration whertof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

(Endorsed:) Filed and entered March 14, 1951. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12645

WARREN H. PILLSBURY, ETC., APPELLANT

vs.

UNITED ENGINEERING COMPANY, ET AL., APPELLEES

Certificate of Clerk, U. S. Court of Appeals for the Ninth Circuit, To Record Certified under Rule 38 of the Revised Rules of the Supreme Court of the United States.

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing seventy-five (75) pages, numbered from and including 1 to and including 75, to

be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of Hon. Philip B. Perlman, Solicitor General of the United States, counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 4th day of June, 1951. [SEAL.]

(S.) PAUL P. O'BRIEN,

Clerk.

In the Supreme Court of the United States

No. — October Term, 1951

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY, ET AL. (HOWARD JOHNSON
INJURY)

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY, ET AL. (FRANK S. CURNETT
INJURY)

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

MATSON TERMINALS, INC., ET AL. (LOUIS SHALLAT INJURY)

ALBERT J. CYR, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY, ET AL. (CHRIS MANOS INJURY)

Upon consideration of the application of counsel for the petitioners,

It is ordered that the time for filing petition for certiorari in the above-entitled causes be, and the same is hereby, extended to and including 11th day of August 1951.

HUGO L. BLACK,
*Associate Justice of the Supreme
Court of the United States.*

Supreme Court of the United States

No. 229, October Term, 1951

[Title omitted.]

Order allowing certiorari

(Filed October 15, 1951)

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

VOLUME

III



Volume III

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 229

WARREN H. PILLSBURY AND ALBERT J. CYR, DEPUTY
COMMISSIONERS FOR THE THIRTEENTH COMPEN-
SATION DISTRICT, ETC., PETITIONERS

UNITED ENGINEERING COMPANY, A CORPORATION
FIREMEN'S FUND INSURANCE COMPANY, ET AL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 3, 1951
CERTIORARI GRANTED OCTOBER 13, 1951

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No. 12646

**United States
Court of Appeals**
for the Ninth Circuit.

WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act,

Appellant,

vs.

MATSON TERMINALS, INC., a Corporation, and
FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Appellees.

Transcript of Record

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

NAMES AND ADDRESSES OF ATTORNEYS.

FRANK J. HENNESSY,

United States Attorney.

EDGAR R. BONSALL,

Assistant United States Attorney,

Post Office Building,

San Francisco, California.

Attorneys for Defendants and Appellant.

JOHN H. BLACK,

EDWARD R. KAY,

233 Sansome Street,

San Francisco, California.

Attorneys for Plaintiffs and Appellees.

In the Southern Division of the United States District Court for the Northern District of California

No. 29058R

MATSON TERMINALS, INC., a Corporation,
FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Plaintiffs,

vs.

WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act,

Defendant.

COMPLAINT FOR INJUNCTION PURSUANT
TO TITLE 33, U.S.C.A. SECTION 921

To the Honorable District Court of the United States, Northern District of California, Southern Division:

The plaintiffs, Matson Terminals, Inc., a corporation, and Fireman's Fund Insurance Company, a corporation, respectfully show:

I.

Plaintiff, Matson Terminals, Inc., at all times herein mentioned has been and now is a corporation; Plaintiff Fireman's Fund Insurance Company, at all times herein mentioned has been and now is a

corporation. Both of said corporations have their principal offices in the City and County of San Francisco, State of California.

II.

That plaintiff Fireman's Fund Insurance Company, a corporation, at all time herein mentioned, was the Longshoremen's and Harbor Workers' Compensation insurance carrier for said Matson Terminals, Inc., a corporation.

III.

On the 21st day of November, 1947, one, Louis Shallat, was in the employ of the said Matson Terminals, Inc., as a longshoreman and on said date was working as such longshoreman aboard the SS "Mauna Loa" on navigable waters of the United States at San Francisco Harbor, California.

IV.

On said date and at said place, the said Louis Shallat suffered an injury to his left hand while employed as aforesaid.

V.

That thereafter on November 24 and 25, 1947, plaintiffs herein provided medical treatment to the said Louis Shallat for the said injury. That the said Louis Shallat thereafter sought no further medical treatment until the 4th day of April, 1949, following which plaintiffs provided further medical treatment during the months of April and May, 1949.

VI.

That the plaintiff Matson Terminals, Inc., duly filed with defendant on February 16, 1948, a report covering said injury in accordance with Section 30 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 930.

VII.

That no compensation payments were ever made to the said Louis Shallat, or promised by said plaintiffs, or either of them.

VIII.

That on the 23rd day of May, 1949, a claim for compensation was filed with the defendant Deputy Commissioner by the said Louis Shallat, alleging that he had sustained certain disability to his left hand as the result of said injury of November 21, 1947.

IX.

On July 28, 1949, defendant made and entered a compensation order awarding compensation payment to the said Louis Shallat, as follows:

Federal Security Agency
Bureau of Employees Compensation
13th Compensation District
Case No. 716-864, Claim No. 3242

In the Matter of the Claim for Compensation Under
the Longshoremen's and Harbor Workers'
Compensation Act

LOUIS SHALLAT,

Claimant,

against

MATSON TERMINALS, INC.,

Employer,

FIREMAN'S FUND INSURANCE COMPANY,
Insurance Carrier.

COMPENSATION ORDER—AWARD OF
COMPENSATION

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

Findings of Fact

That on the 21st day of November, 1947, the claimant above-named was in the employ of the employer above named at San Francisco Harbor, in the State of California, in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Fireman's Fund Insurance Company; that on said day

claimant herein while performing service for the employer as a longshoreman and engaged in stevedoring operations on a vessel upon navigable waters of the United States at said harbor sustained personal injury arising out of and in the course of his employment and resulting in disability as follows: He caught his left hand between a sling and a bight, causing a contusion of the left hand and exacerbation of a pre-existing progressive arthritis of the proximal joint of the second or middle finger; that the employer furnished claimant with medical treatment, etc., in accordance with Section 7(a) of the said Act; that the average weekly earnings of the claimant herein at the time of his injury amounted to the sum of \$90.00; that claimant did not sustain at said time any sufficient injury to the right hand to be a cause of any disability therein; that no compensation has been paid; that the claim for compensation was filed on May 23rd, 1949, the employer's first report was filed in the office of the Deputy Commissioner on February 16th, 1948, that by reason of the absence of any temporary disability claimant did not become entitled to any compensation payments for which he could make claim until the condition of his left second finger reached a permanent stage and became a permanent disability, that said permanent disability became fixed within one year prior to the filing of the claim and the claim is not barred by limitations; that by reason of his injury claimant has sustained permanent disability amounting to loss of 50% of the use of his finger

end entitling him to compensation for 9 weeks at \$25.00 a week, amounting to \$225.00, no part of which has been paid; that claimant's physician, Dr. V. C. Stehr, has rendered service to claimant in the prosecution of his claim consisting in examination and filing of a report for use as evidence herein, that a fee is charged and approved therefor in the sum of \$25.00, and lien granted therefore upon compensation herein awarded claimant.

Upon the foregoing facts the Deputy Commissioner makes the following:

Award

That the employer, Matson Terminals, Inc., and the insurance carrier, Fireman's Fund Insurance Company, shall pay to the claimant compensation as follows:

To claimant the sum of \$225.00 forthwith, less however the sum of \$25.00 to be deducted therefrom and paid to claimant's physician, Dr. V. C. Stehr, upon his lien for fee for examination and report.

Given under my hand at San Francisco, California, this 28th day of July, 1949.

WARREN H. PILLSBURY,

Deputy Commissioner,

13th Compensation District.

X.

That the evidence in the hearing before the said defendant is without conflict that the said Louis Shallat sustained injury on the 21st day of Novem-

ber, 1947, that he received medical treatments therefor and that no compensation payments were made or promised to the said Louis Shallat by the plaintiffs, or either of them.

XI.

That no claim for compensation was filed with the Deputy Commissioner by or on behalf of the said Louis Shallat until more than one year after the injury of November 21, 1947, to wit: May 23, 1949.

XII.

That prior to the first hearing on said claim, plaintiffs pleaded that said claim was barred by the period of limitations prescribed by the said Longshoremen's and Harbor Workers' Compensation Act.

XIII.

That by the said Compensation Order of July 28, 1949, the plaintiffs herein are ordered to pay to the said Louis Shallat the sum of \$225.00, less the sum of \$25.00 payable to the said Shallat's physician upon his lien for fee for examination and report.

XIV.

Plaintiffs are informed and believe, and upon such information and belief, allege that the said Louis Shallat, claimant in the said proceedings before the defendant Deputy Commissioner, to whom compensation payments are ordered to be paid as aforesaid, is a person of no financial means and

without property, and if plaintiffs should pay to him the sum awarded in said Compensation Order, they could not be recovered back and that accordingly plaintiffs will suffer great and irreparable damage and injury if said award and order is not stayed.

XV.

Plaintiffs are informed and believe that an early date for a hearing on the merits of this matter can be had before this Honorable Court.

XVI.

Plaintiffs believe that there is a great probability that the said Compensation Order of the defendant will be set aside by this Court on the ground that said defendant had no jurisdiction to issue such Order in view of the uncontradicted evidence that the said claim was filed more than one year after the date of said injury.

Wherefore, plaintiffs pray that said Compensation Order and Award be set aside and the same and its enforcement be permanently enjoined and restrained; that in addition said compensation order may be suspended and that an order be entered for an interlocutory injunction suspending the same during the pendency of this action; that payments required by said order and award and each of them be stayed until final decision herein; and that this Court may find and adjudge that the said claim for compensation was filed more than one year after the said injury and that, therefore, the said Louis

Shallat's right to compensation, under the provisions of the Longshoremen's and Harbor Workers' Compensation Act is barred; and that plaintiffs should not be, nor is either of them subject to or liable to pay compensation because of the said injury to the said Louis Shallat; and that said claim is not within the jurisdiction or power of defendant to administer or apply as against either plaintiff; and for such other and further relief as to the Court may seem just.

/s/ JOHN H. BLACK,

/s/ EDW. R. KAY,

Attorneys for Plaintiffs Matson Terminals, Inc.,
and Fireman's Fund Insurance Company.

United States of America,
Northern District of California,
City and County of San Francisco—ss.

G. E. Libby, being first duly sworn, deposes and says:

That he is one of the officers, to wit, Assistant Marine Secretary of the Fireman's Fund Insurance Company, a corporation, one of the plaintiffs herein; that he has read the foregoing Complaint for Injunction Pursuant to Title 33, U.S.C.A. Section 921, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters set forth therein upon information

and belief, and as to these matters he believes it to be true.

/s/ G. E. LIBBY.

Subscribed and sworn to before me this 9th day of August, 1949.

[Seal] /s/ LAURA L. MacHUGH,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires January 15, 1952.

[Endorsed]: Filed August 10, 1949.

[Title of District Court and Cause.]

MOTION OF DEFENDANT, WARREN H. PILLSBURY, DEPUTY COMMISSIONER, TO DISMISS BILL OF COMPLAINT

Now comes the defendant, Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission, for the 13th Compensation District, by his attorney, Frank J. Hennessy, United States Attorney for the Northern District of California, and moves this Honorable Court to dismiss the Bill of Complaint after review of the Compensation Order filed herein for the following reasons:

1. That the Bill of Complaint filed herein does not state a cause of action and does not entitle plaintiffs to any relief, nor does said Bill of Complaint state a claim against the defendant, Warren H. Pillsbury, Deputy Commissioner, upon which relief can be granted;

2. That it appears from the Bill of Complaint, including the Transcripts of Testimony taken before the Deputy Commissioner on file herein, that the findings of fact of the Deputy Commissioner, in the compensation order filed by him on September 3, 1948, complained of in the Bill of Complaint, were supported by evidence and under the law said findings of fact should be regarded as final and conclusive.

3. That it appears from the Bill of Complaint, including said Transcripts of Testimony, that said compensation order complained of herein is in all respects in accordance with law.

4. For such other good and sufficient reasons as may be shown.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ EDGAR R. BONSALE,

Assistant United States Attorney, Attorneys for
Defendant, Warren H. Pillsbury, Deputy Commissioner.

This motion will be based on transcript of the record of proceedings before defendant, Warren H. Pillsbury, deputy commissioner, 13th Compensation District, which said defendant intends to introduce in evidence as defendant's exhibit #1, and on the Points and Authorities submitted in connection with this case.

[Endorsed]: Filed November 28, 1949.

In the United States District Court for the Northern District of California, Southern Division

No. 29058

MATSON TERMINALS, INC., a Corporation, et al.,

Plaintiff,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, etc.,

Defendant.

Appearances:

JOHN H. BLACK,

EDWARD R. KAY,

233 Sansome Street,
San Francisco, California,

Attorneys for Plaintiffs.

FRANK J. HENNESSY,

United States Attorney.

EDGAR R. BONSALL,

Assistant United States Attorney.

MACKLIN FLEMING,

Assistant United States Attorney,
San Francisco, California.

Attorneys for Defendants.

OPINION

Goodman, District Judge.

In these four consolidated actions, the plaintiff employers and their respective insurance carriers have asked this court to set aside and enjoin the enforcement of Compensation Orders and Awards made by the Deputy Commissioner pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 USC 901-950. The question presented is whether the Deputy Commissioner lacked jurisdiction to make the awards because the claims for compensation were not filed within a year after the claimants were injured as is allegedly required by Section 13(a) of the Act. The Deputy Commissioner has moved to dismiss the complaints on the ground that the claims were timely filed and that therefore the awards were proper.

Section 13(a) of the Act provides that "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefore is filed within one year after the death, except that if payment of compensation has been made, without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred." (Emphasis added.)

For a proper understanding of the issues presented, a brief account of the injuries suffered by

the claimants and the events leading up to the compensation awards is here necessary.

Claimant Howard Johnson on May 12, 1947, struck his head on a cross-beam of the vessel Monterey while working as a leaderman welder. The muscles of his neck were severely strained and he was unable to continue to weld aboard ship. His employer transferred him to lighter work in the machine shop at no reduction in wages. Although his neck continued to trouble him, he continued to work regularly for more than a year until he was discharged by the new owner of the ship yards because he was unable to weld aboard ship. Since that time he has been employed only intermittently because he is physically able to perform only the less strenuous types of welding operations. When Johnson first lost time from work, he was told it was too late for him to file a claim for compensation. But when he discovered how many employment opportunities were lost because of his condition, he decided to attempt to secure compensation. On January 31, 1949, more than a year and a half after the accident, he filed his claim with the Deputy Commissioner.

Claimant Frank Curnutt on February 17, 1947, while employed as a sheetmetal worker aboard the S. S. Lurline, wrenched his back when he lifted a pre-heater from the deck to a table. He did not work for several days. When he returned to his job, he was relieved of all heavy work on doctor's orders. With some discomfort, he performed lighter duties at his former wage rate until his job ended

in about a year. After resting for two weeks to give his back a chance to heal, he obtained work with the Bethlehem Steel Company. In June of 1948, he quit work for five weeks, as a therapeutic measure suggested by his physician. In July he went to work for a sheet-metal company, but soon was forced to give up this job, and subsequent ones, because the work proved too strenuous. On January 17, 1949, nearly two years after injuring his back, Curnutt filed his claim for compensation.

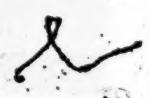
Claimant Louis Shallat on November 21, 1947, while working as a stevedore aboard the S. S. Mauna Lei, caught his hands between a sling and a bight. Considerable pain and swelling in his hands resulted. According to Shallat, his left hand has pained him continuously since it was injured and he has applied self-treatment. While he testified at the hearing before the Deputy Commissioner that the injury grew "more and more severe," he also stated that "the left hand is still the same as it was when I got injured." Shallat had lost no time from work up to the date of the final hearing before the Deputy Commissioner. At that hearing, Shallat stated that he did not file his claim for compensation until May 23, 1949, nearly a year and a half after he was injured, because he thought the injury "wasn't so serious," and that "it would work its way out."

Claimant Chris Manos was welding on the deck of the tanker Purisima on December 22, 1947, when he was struck on the head by an iron saddle falling from above. He was instructed by the examining

physician not to weld thereafter, and consequently was given lighter work by his employer. He suffered no reduction in rating or wages. About two months later his employment terminated as a result of a general reduction in the number of men employed at the ship yard. In a week or so he obtained a shop welding job at a slightly higher wage than he had previously received at the ship yard. This job ended in January of 1949, due to a general lay off. At the time of the hearing before Deputy Commissioner on August 29, 1949, Manos was still unemployed, but was planning to engage in sales work. Manos' neck has troubled him continually since he was struck on the head and he has received regular medical treatment. In some respects the condition of his neck apparently gradually has improved and in others it has grown worse. Manos filed a claim for compensation on August 17, 1949, more than a year and a half after he was injured.

The Deputy Commissioner justified his awards to these claimants and now grounds his motion to dismiss these complaints on his conclusion that Section 13(a) of the Compensation Act sets the one-year period of limitation running, not from the date of injury, but from the date on which the injury became compensable. There may be merit to this interpretation of Section 13(a) but these causes can be determined without reaching the question.

In my opinion, the Deputy Commissioner erred in assuming that the injuries suffered by these claimants were not compensable so long as they con-



tinued to work with no reduction in wages. It is now settled law in this Circuit that a claimant is not precluded from recovering compensation under the Act because he has been paid his old wages at all times since resuming work after being injured. *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 F.2d 513 (1939). Accord, *Luckenbach S. S. Co. v. Norton*, 96 F.2d 764 (3 Cir. 1938); *Hartford Accident and Indemnity Co. v. Hoage*, 85 F. 2d 420 (App. D. C. 1936). The Act says nothing about "compensable injuries" but only provides that compensation must be paid for disability. Disability is defined by Section 2(10) as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." The statute makes earning capacity the test. Earning capacity may be properly defined to mean ability to earn, rather than wages actually received. And this means ability to earn in the open labor market, not ability to secure exceptional consideration from a sympathetic employer.

Although their employers did not reduce their wages, claimants Johnson, Curnutt, and Manos were physically unable, following their injuries, to perform the same duties they had previously performed. Pain and suffering were continuous. They were well aware that unless there was improvement in their physical condition, they would be unable to again engage in strenuous activity. Claimant Manos admitted that he was told by the physician, who examined him following his injury, that he could obtain compensation. Instead of doing so, at the same physician's suggestion, he sought and ob-

tained from his employer lighter work at his former wages.

Claimant Shallat apparently continued to perform the same duties following his injury as he had before. But, if his statements to examining physicians are accepted as true, he was in constant pain. The Compensation Act does not deny relief to an injured workman until his pain exceeds endurance.

All four of the present claimants have been disabled within the meaning of the Longshoremen's and Harbor Workers' Compensation Act since the day they were injured. Consequently they had compensable claims.¹ Such claims were not timely filed. It follows that the awards of the Deputy Commissioner were not within his power to make. The court is aware of the well established rule that the Deputy Commissioner's findings of fact should not be disturbed if there is any substantial evidence to support them. But his conclusion that these claimants suffered no disability until long after they were injured is based on an error of law. The undisputed factual record shows that the earning capacity of these men was impaired from the time of injury.

The delay in the filing of these claims is wholly understandable. None of these claimants appear to have been fully aware of his rights and obligations under the Compensation Act. And, even had these men realized the consequences of delay, it is only natural that they should hesitate to jeopardize their

¹See *Liberty Mutual Insurance Co. v. Parker*, 19 F. Supp. 686 (Md. 1937) in which the same conclusion was reached on somewhat similar facts.

opportunity to continue working at their former wage rate by pressing claims for compensation. In a relatively short time the wages of these claimants would have equaled the maximum awards they could ever hope to receive. These, however, are considerations for the lawmakers and not for the Courts.

The motions to dismiss are denied and the awards are severally set aside and vacated.²

Dated May 10, 1950.

[Endorsed]: Filed May 11, 1950.

²The above order in fact fits the issues raised by the pleadings. But in order to technically comply with the rule announced by our Court of Appeals in *Twin Harbor Stevedoring & Tug Co. v. Marshall*, supra, the causes are transferred to the Admiralty docket, the motions will be treated as exceptions and are overruled and a decree will enter vacating and setting aside the awards.

In the United States District Court for the Northern District of California, Southern Division

No. 29058-Civil

MATSON TERMINALS, INC., a corporation,
et al.,

Plaintiff,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, etc.,

Defendant.

ORDER AND DECREE

In the above-entitled case the motion to dismiss is denied and the award is severally set aside and vacated.

It is further ordered that the above-entitled case is transferred to the Admiralty docket, the motion will be treated as exception and is overruled and a decree is hereby entered vacating and setting aside the award.

Dated at San Francisco, California, this 11th day of May, 1950.

_____/s/ LOUIS E. GOODMAN,

United States District Judge.

(As amended by order of August 23, 1950.)

[Endorsed]: Filed May 11, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, defendant in the above-entitled action, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final order of this Court filed on May 11, 1950, denying the motion of the defendant to dismiss the complaint and vacating and setting aside the order of the defendant awarding compensation dated July 28, 1949.

Dated: July 3, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ EDGAR R. BONSALL,
Assistant U. S. Attorney.
Attorneys for Defendant.

[Endorsed]: Filed July 3, 1950.

United States Federal Security Agency
Bureau of Employees Compensation
Before Warren H. Pillsbury, Deputy Commissioner
13th Compensation District

Case No. 716-864, Claim No.

LOUIS SHALLAT,

Claimant,

vs.

MATSON TERMINALS, INC.,

Employer,

FIREMAN'S FUND INSURANCE CO.,

Insurance Carrier.

TRANSCRIPT OF TESTIMONY
AT HEARING

May 23, 1949

Pursuant to notice, this matter was heard before Warren H. Pillsbury, Deputy Commissioner, Bureau of Employees Compensation, at the Coroner's Court, at 480 Fourth Street, Oakland, California, on Monday, the 23rd day of May, 1949, at 9 a.m.

Appearances:

Claimant present in person.

Defendants represented by F. W. Sexton, claims representative, appearing for B. W. Greenough.

Mr. Pillsbury: Hearing on claim for compensation. In this matter, claimant is claiming com-

compensation for an injury to the left hand and now to the right hand also from an injury of November 21, 1947. Two preliminary conferences have been held since receipt of claimant's letter of March 11, 1949, claiming compensation. As a result of the first conference, medical examinations were arranged, and as a result of the second conference, treatment was tendered and given for about six weeks. It appears today that claimant contends no further gain can be had from treatment, and requests a permanent disability rating for his hands. He agrees that he has not lost time from work to date as a result of the injury.

It appearing that formal claim has not yet been received, I have filled out such claim for claimant, which he has signed, and it is ordered filed. Stipulated that hearing may proceed immediately.

Mr. Sexton, what is defendant's position?

Mr. Sexton: We raise the issue of nature and extent of disability, liability for compensation, and we will also plead the statute of limitations inasmuch as the accident occurred November 21, 1947, and claim is being filed today, May 23, 1949.

Mr. Pillsbury:

The Following Facts Are Agreed to by the Parties:

1. That claimant Louis Shallat was in the employ of defendant Matson Terminals, Inc., at San Francisco Harbor, California, on and about November 21, 1947, as a longshoreman, and at said time said employer had secured the payments of compensation under the Longshoreman's and Har-

bor Workers' Compensation Act by insurance in defendant Fireman's Fund Insurance Company;

2. That claimant sustained an injury to his left hand on said date;

3. That at said time claimant was performing stevedoring service on a vessel on navigable waters of the United States, and the claim is within the provisions of said act and the jurisdiction of the Deputy Commissioner.

4. Medical treatment has been furnished by defendants.

5. Claimant's average earnings may be fixed for the purpose of this proceeding at \$90.00 a week at the time of said injury;

6. No compensation has been paid and claimant asserts he has not lost any time from work to the present time.

The Issues Are:

1. Whether claimant has sustained permanent disability as a result of said injury to either hand;

2. Whether his right hand was injured in said injury;

3. Whether the claim is barred by the period of limitations prescribed by said act.

Mr. Pillsbury: Any other issues?

Mr. Sexton: I think that covers it.

LOUIS SHALLAT

claimant, having been first duly sworn, testified as follows:

By Mr. Pillsbury:

Q. You are Louis Shallat? A. Yes.

Q. You live at 341 42nd Street, Oakland?

A. Yes.

Q. You sustained an injury, did you, on November 21, 1947? A. Yes.

Q. Did you hurt your left hand or both hands?

A. Both hands, but this is more severe (indicating left hand). The severity is on this hand.

Q. The left hand?

A. The left hand where the severe is.

Q. Did you say anything to the doctors about hurting your right hand at the same time?

A. Yes, I did.

Q. Do you know why they did not report any injury to the right hand? Did you ask for any treatment for the right hand? A. Yes, I did.

Q. Do you know why the doctor did not report it? A. It was not reported.

Q. Why not?

A. The only report was on the left hand.

Q. Why was that if the hurt was on both hands?

A. The reason why is because I mentioned the severity of the pain was on the left hand but not in the right. You have to work with both hands, but the hook caught me heavy on the left.

Q. What happened to your right hand?

(Testimony of Louis Shallat.)

A. Well, I was jammed in the bight when he went up.

Q. And were both hands caught in the bight?

A. Yes, both hands were caught.

Q. How is your left hand today?

A. The left hand is still the same as it was when I got injured.

Q. How is it?

A. The right hand?

Q. The left hand?

A. The left hand is the same.

Q. How does it feel today?

A. Terrific pains when I lift something. It goes right through me. It affects the whole hand, and lots of times I have to drop something, I cannot hold it with the left hand.

Q. How is your right hand today?

A. My right hand is far better than the left hand.

Q. How is it? How much does it bother you now?

A. Just around here (indicating). This hand bothers me to whole length (indicating left hand to shoulder).

Q. How much does your right hand bother you now?

A. It still bothers me very little, but not so severe as the left hand.

Q. I notice in the doctor's first report he says something about the X-ray showing a piece of metal in your left hand. Do you know when you got it?

A. No, it doesn't. I thought so, too. I went to

(Testimony of Louis Shallat.)

the Marine Terminals and through the X-rays it shows it, it did not show it in their X-rays. Way before this injury ever happened I took some slivers out of the gloves, handling big tanks, and through the X-rays I mentioned it bothered me this sliver, and they took the slivers out.

Q. Do you know of any time that you ever got some metal in the left hand?

A. No, I do not. I have no recollection of it.

Q. Why did you wait so long before filing a claim?

A. Well, I didn't make no notes of it. I didn't think it was serious. I did file a report of the injury immediately and he told me, the main walking boss, he says, "My God——"

Q. Wait a minute. The question is, why didn't you file a claim earlier?

A. You mean a claim for compensation?

A. Yes?

A. I thought it wasn't so serious. I thought it would work its way out. I took it upon my own. I thought it would gradually work itself out.

Q. I received a letter from you on March 11th of this year. Was that the first time you raised any question about it?

A. It was getting more and more severe.

Q. Was that the first time that you took up your injury?

A. Yes. It got to the point it was too severe for me and I couldn't figure out what should be done.

(Testimony of Louis Shallat.)

Mr. Pillsbury: Any questions, Mr. Sexton?

Q. (By Mr. Sexton): Mr. Shallat, you saw several doctors for treatment of your left hand, but you never mentioned your right hand, is that correct? You did not mention the injury to the right hand?

A. I did, but that the injury to the right wasn't as severe as the left.

Q. (By Mr. Pillsbury): What is the first time you had any treatment for the right hand?

A. I never got treatment.

Q. You have it painted now?

A. I put that there myself. It helps me out.

Q. You never had treatment for the right hand by a doctor?

A. No, but on the therapy I have been putting both hands in the whirlpool, the both hands in, so that both hands were getting the treatment.

Mr. Pillsbury: Go ahead, Mr. Sexton.

Q. (By Mr. Sexton): In this period from November, 1947, until March of 1949, over a year, about a year and a quarter, did you receive any treatment at all for your hand? Did you go to any doctor at all?

A. I was taking my own treatment.

Q. You were treating yourself or going to a doctor?

A. I was treating myself because you weren't paying for it. I was paying it out myself.

Q. Why didn't you file a claim for it?

A. I made the report out but I didn't think it serious. It is my own fault, to some extent. I will

(Testimony of Louis Shallat.)

admit that, because I thought it wasn't so serious until it gradually proved itself serious.

Q. (By Mr. Pillsbury): When did you go to your own doctor? A. I have no doctor.

Q. I thought you said you paid out money for your own doctor? A. I bought things.

Q. For medicine? A. Yes.

Q. Not for a doctor?

A. No, not for a doctor. I got a few things, like a violet ray.

Q. (By Mr. Sexton): You knew, however, did you not, that you were entitled to medical treatment? Working as a longshoreman, you knew you were entitled to medical treatment for injuries, did you not? A. What could you do?

Q. Didn't you know you were entitled to go to the doctor?

A. Perhaps I did. I didn't know whether the doctor could do me any good. I did go to Dr. Delprat. I went to him and here is what he told me. I raised the objection to him. He says, "You can try to go to work and see how your hand is." When I went down I almost killed myself going down in the hold and I fell.

Q. You didn't go back to him after that treatment? A. No, I did not.

Q. Didn't he ask you to come back again? He asked you to try it out?

A. No. I was so mad I never went back. I mentioned that here.

Mr. Sexton: That is all I have.

(Testimony of Louis Shallat.)

Mr. Pillsbury: I have the following medical reports which are exhibited for introduction in evidence:

Report of Dr. Delprat, November 25, 1947, surgeon's first report, received in evidence as Exhibit "A";

Report of Dr. C. F. Burton, April 5, 1949, Exhibit "B";

Report of Dr. Delprat, December 10, 1947, Exhibit "C";

Does either side have any other medical reports?

Mr. Sexton: You have the last one of Dr. Burton, I believe.

Mr. Pillsbury: Yes.

I will send claimant to U. S. Marine Hospital, San Francisco, for examination. Copy of report will be sent to each side, and case then submitted for decision unless within one week thereafter either side requests further proceedings.

REPORTER'S CERTIFICATE

I hereby certify that the foregoing is a correct transcript of the testimony and proceedings taken in the above matter at the hearing held on the 23rd day of May, 1949.

/s/ L. P. SMITH,
Reporter.

EXHIBIT "A"

Copy of excerpt from report of Dr. G. D. Delprat, Nov. 25, 1947:

"6. Date of accident: Nov. 21, 1947. Hour, 8:30 p.m.

"7. State in patient's own words where and how accident occurred: Caught left hand between sling and bight.

"8. Give accurate description of nature and extent of injury and state your objective findings: Contusion left hand, no break in skin, but moderate swelling back of hand.

"9. Will the injury result in (a) Permanent defect: No.

"10. Is accident above referred to the only cause of patient's condition? Yes.

"11. Is patient suffering from any disease of the heart, lungs, brain, kidneys, blood, vascular system or any other disabling condition not due to this accident?

"12. Has patient any physical impairment due to previous accident or disease? Give particulars. X-ray continued, there is a metallic fragment 1 mm. in diam. and 5 mm. in length lying near the base of the 2nd metacarpal. Nov. 24, 1947, in the office, sent for films, exam. advice.

"13. Has normal recovery been delayed for any reason?

"14. Date of your first treatment? Nov. 25, 1947. Who engaged your services? Employer.

"15. Describe treatment given by you: Again in office. Office advised his films are negative for injury, use hot soaks, etc.

"16. Were X-rays taken? Yes. By whom? C. C. Fulmer, 384 Post St., SF 8 When? 11-24-47.

"17. X-ray diagnosis: 'There is no evidence of bone injury, left hand; mild hypertrophic changes of bases of terminal phalanges of all the digits.'

"18. Was patient treated by anyone else?

"19. Was patient hospitalized? No.

"20. Date of admission to hospital:

"21. Is further treatment needed? Yes. For how long? 2 wks observation.

"22. Patient will be able to resume regular work on: prob. 1 week.

/s/ G. D. DELPRAT, M. D."

EXHIBIT "B"

Copy of excerpt from report of Dr. C. F. Burton, April 5, 1949:

"—Comment: This man apparently suffered a crushing type of injury to his left hand in November, 1947. Examination at that time revealed no

acute bony injury and he continued working. However, he states that there has been constant pain since that time. Examination does reveal some weakness of grip and some pain on pressure over the metacarpophalangeal joints. I feel that his complaints are considerably exaggerated and are not compatible with the injury sustained so long ago. Furthermore, it is my opinion that no pain is completely unrelenting; even the severest pain of cancer will let up from time to time. For this reason I feel that his complaints of excruciating constant pain are exaggerated and to a large part functional in origin rather than organic. There is some thickening of the joint capsule, especially at the heads of the second and third metacarpals and it is quite likely that at the time of the injury there was some damage to the capsular structure which damage has persisted. Whether or not any treatment is indicated is problematical. However, from a psychosomatic point of view a course of physiotherapy will probably give him considerable relief.

"In reference to the complaints of the left leg, it is my opinion that there is no possible connection physiologically or anatomically between the injury sustained to the left hand and the complaints in the left leg. The complaints in the left leg are more than likely due to the injury sustained in February, 1949.

"/s/ C. F. BURTON, M. D."

EXHIBIT "C"

Copy of report of Dr. G. D. Delprat, Dec. 10, 1947:

"When will patient be able to work? Believed to have continued at work.

Progress of case and prognosis: To supplement our report of November 25, 1947, this is to state that patient came to our office November 25, "In office today, shown his films, given advice."

G. D. DELPRAT, M. D."

[Endorsed]: Filed May. 26, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Complaint for Injunction Pursuant to Title 33, U.S.C.A. Section 921.

Motion of Defendant, Warren H. Pillsbury, Deputy Commissioner, to Dismiss Bill of Complaint.

Notice of Appeal.

Statement of Points on Which Appellant Intends.

to Rely and Designation of Parts of the Record Necessary for the Consideration Thereof.

Deputy Commissioner's Certification of Pleadings, Transcript of Testimony, Exhibits (A, B and C,) and Decision.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 10th day of August, A.D. 1950.

C. W. CALBREATH,
Clerk.

[Seal]: /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12646. United States Court of Appeals for the Ninth Circuit. Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act, Appellant, vs. Matson Terminals, Inc., a Corporation, and Fireman's Fund Insurance Company, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 9, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States District Court for the Northern District of California, Southern Division

No. 12646

WARREN H. PILLSBURY, Deputy Commissioner, etc.,

Appellant,

vs.

MATSON TERMINALS, INC., a Corporation,
et al.,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF PARTS OF THE RECORD NECESSARY FOR THE CONSIDERATION THEREOF

Appellant states that he intends to rely upon the following points on appeal:

1. That the District Court erred in failing to give finality to findings of fact of the deputy commissioner supported by evidence.
2. That the District Court erred in reevaluating the evidence before the deputy commissioner, and in making different fact conclusions from those found by the deputy commissioner.
3. That the District Court misconstrued the law as to when the time for filing claim for compensation begins to run.

4. That the District Court erred in denying the motion to dismiss the complaint and in setting aside the compensation order complained of.

5. Appellant designates the following parts of the Record as necessary for consideration of the above points.

1. Complaint.

2. Defendant's motion to dismiss complaint.

3. Opinion-order of the United States District Court dated May 10, 1950, and filed on May 11, 1950, and order and decree dated May 11, 1950, denying the motion of defendant to dismiss the complaint and vacating and setting aside the order of the defendant awarding compensation.

4. The transcript of testimony taken at the hearing before the deputy commissioner on January 31, 1949, together with the exhibits which were copied into said transcript at the end thereof.

5. Notice of appeal.

6. This notice.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ MACKLIN FLEMING,
Assistant U. S. Attorney.
Attorneys for Appellant.

[Endorsed]: Filed August 18, 1950.

[Title of Court of Appeals and Cause.]

**MOTION FOR CONSOLIDATION FOR
BRIEFING AND ARGUMENT**

In the above-entitled causes, appellant hereby moves for the consolidation thereof for purposes of briefing and argument in this court, the grounds for the motion being the existence of a common question of law pertinent to each of these causes, and a common opinion of the District Court covering the common point of law herein.

Dated August 28, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ MACKLIN FLEMING,
Assistant U. S. Attorney.
Attorneys for Appellant.

We join in the above motion.

Dated Aug. 28, 1950.

/s/ JOHN H. BLACK,
/s/ EDWARD R. KAY,
Attorneys for Appellees.

In the United States Court of Appeals for
the Ninth Circuit.

ORDER OF CONSOLIDATION

The above-entitled causes are hereby consolidated
for purposes of briefing and argument in this court.

Dated Aug. 28, 1950.

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ CLIFTON MATHEWS,
Circuit Judge.

/s/ WM. E. ORR,
Circuit Judge.

[Endorsed]: Filed August 30, 1950.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12646

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIR-
TEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S
AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION AND FIREMAN'S
FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

Appeal from the United States District Court for the Northern
District of California, Southern Division

PROCEEDINGS HAD IN THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

Excerpt from Proceedings of Wednesday, February 21, 1951

Before HEALY, BONE and ORR, *Circuit Judges*.

ORDER OF SUBMISSION

Ordered appeals herein argued by Mr. Reynold Colvin, Assistant
United States Attorney, counsel for appellants, and by Mr. Ed Kay,
counsel for appellees, and submitted to the court for consideration
and decision.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

Excerpt from Proceedings of Wednesday, March 14, 1951

Before HEALY, BONE and ORR, *Circuit Judges*.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING
OF JUDGMENTS

ORDERED that the typewritten opinion this day rendered by this
court in above causes be forthwith filed by the clerk, and that a
judgment be filed in each cause and recorded in the minutes of this
court in accordance with the opinion rendered.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12,644

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,645

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,646

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

MATSON TERMINALS, INC., A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,647

Mar. 14, 1951

ALBERT J. CYR, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

Appeals from the United States District Court, Northern District of California, Southern Division

Before HEALY, BONE, and ORR, *Circuit Judges*.

HEALY, *Circuit Judge*.

Involved here are consolidated cases, four in number, arising under the Longshoremen's and Harbor Workers' Compensation

Act, 33 USCA §§ 901 et seq. In each case the Deputy Commissioner found a partial disability growing out of injury suffered in the course of employment. In one instance (the Shallat case) the award was for permanent and in the others for temporary disability. On appropriate proceedings before the district court the awards were annulled on the ground that the claims were barred because not filed within one year after the injury as provided in § 13(a) of the Act, 92 F. Supp. 898. The Deputy Commissioner appeals.

In each case the claimant suffered a specific injury from accident on a particular date. No latent injury or occupational disease is involved. There were no voluntary payments of compensation. The claims were filed on dates ranging from 18 to 23 months after the injury. Omitting for the moment what we regard as irrelevant or argumentative matters, the Deputy Commissioner's findings were these:

No. 12,644. Claimant Johnson on May 12, 1947, struck his head on a crossbeam of a vessel while working as a welder, "sustaining extensive strain of the muscles of the neck which still continues painful." His employer continued him in lighter work in a partially disabled condition without reduction in wages until May 15, 1948. He lost no time from work as a result of the injury until about June 15, 1948. Throughout the period in question he was furnished by his employer with medical treatment. His claim for compensation was filed January 17, 1949.

No. 12,645. Claimant Curnutt, on the 18th of February, 1947, while performing services as a sheet-metal worker in ship repair operations sustained personal injury resulting in disability as follows: While lifting a heavy object, he wrenched his back. He was disabled from work for six days, after which he was continued in lighter work at full wages until his employment was terminated January 13, 1948. He did not lose wages in excess of seven days until February 5, 1948. His claim for compensation was filed January 17, 1949. Medical treatment was furnished him by the employer throughout the period.

No. 12,646. Claimant Shallat on November 21, 1947, while performing services as a longshoreman on a vessel sustained personal injury resulting in disability as follows: He caught his left hand between a sling and a bight, causing a contusion of the left hand, and exacerbation of a pre-existing progressive arthritis of the proximal joint of the second or middle finger. Apparently he lost no time because of the injury and continued at work. It does not appear from the findings whether he received medical treatment at the expense of his employer. His claim for compensation was filed May 23, 1949.

No. 12,647. Claimant Manos on December 22, 1947, while performing services as a welder in the repair of a ship, sustained personal injury resulting in disability when he was struck on top of the head by an iron bar falling from above, suffering strain of the musculature in the cervical region. Following the injury he continued at his regular occupation as a welder without loss of time or wages until January 31, 1949, at which time, because of the condition of his neck, he was forced to discontinue working as a welder and seek other and lighter employment. Throughout the employer furnished him with medical treatment. His claim for compensation was filed August 17, 1949.

The material portion of § 13(a) of the Act reads: "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, . . . except that if payment of compensation has been made without an award on account of such injury . . . a claim may be filed within one year after the date of the last payment . . ."

The Commissioner argues that the word "injury" should be construed as meaning "compensable injury." This, he says, has been the practical administrative construction of the term for a long time. He says that the interpretation is "consistent" with § 19(a), providing that a claim for compensation "may be filed . . . at any time after the first seven days of disability," and with § 6(a) providing that "no compensation shall be allowed for the first seven days of the disability . . ." He adds that unless the interpretation meets with judicial approval his office will be flooded with a load of unnecessary claims.

We may observe in passing that the injured men appear to have suffered a disability of greater or less extent from the outset. Two of them, at least, as the Commissioner found, had to be put on lighter work, and all of them confessedly continued from the time of injury to suffer pain and discomfort from it. It is true they lost no time; or none in excess of seven days anyway, and were paid their old wage, but those facts alone do not spell absence of disability for which an award may be made. See *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 9 Cir., 103 F. 2d 513, where this court sustained an award under like circumstances, saying that wages received by a worker who has suffered an injury are not conclusive and that ability to earn is the test.

But we do not, as the trial court did, rest decision on the *Twin Harbor* holding. What the Commissioner's argument really amounts to is that the statute begins to run, not from the date of the injury, but from the date of disability. The view appears irreconcilable with the plain terms of the Act. The argument necessarily assumes that the terms "injury" and "disability" are interchangeable. However, as we pointed out in *Kobilkin v. Pills-*

bury, 103 F. 2d 667, 669, the terms are separately defined in the statute and are not synonymous. Section 2(2) states that when used in the Act "the term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, . . ." In the same section (subdivision 10) "disability" is defined as meaning "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment."

In the *Kobilkin* case, supra, the claimant was disabled from work for a period of three weeks following his injury, for the allowable portion of which time compensation was voluntarily paid him. He then resumed his employment at the former wage and continued to work for 17 months, when his condition worsened and it was learned that his injury was more extensive than had originally been thought. Later he filed a claim. Deputy Commissioner Pillsbury disallowed it because not filed within one year from the last payment of compensation as provided in § 13(a). We upheld the ruling and the Supreme Court affirmed without opinion, 309 U.S. 619.¹ Answering an argument somewhat analogous to the one made here, we said that the injury "was inflicted at the time of the accident, not when its full extent was first noted at the later time."

The Commissioner endeavors to distinguish the holding on the ground that *Kobilkin* was off work for more than seven days in consequence of the injury and was appropriately paid compensation. If the distinction were accepted as of controlling significance a startling result would ensue, as will be seen from the following illustration: Worker A is disabled from work for eight days following his injury, and is accordingly paid compensation for the eighth day. If he fails to file a claim within a year after the payment he is forever barred. Worker B is disabled from work for but six days or less after injury, and in line with § 6(a), supra, is paid no compensation. According to the argument there is no time limit within which B may file a claim.

As the language of § 13(a) evidences, Congress was not unaware that there would be many cases like B's and it deliberately provided that the right to compensation in such cases would be

¹ The *Kobilkin* case, unlike the present, may be thought to have involved a latent or undiscovered injury. It is arguable that in such cases the injury should be treated as arising when its true nature is discovered. Possibly this circumstance accounts for the four to four division among the justices when the case was disposed of in the Supreme Court.

come barred unless claim therefor is filed within one year after the injury. If it is thought desirable in the interest of justice or practical administration that a different limitation be prescribed, the power to effect the change resides in Congress, not in the courts.

The decrees of the district court in the several cases are affirmed.

(Endorsed:) Opinion. Filed Mar. 14, 1951. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12646

WARREN H. PILLSBURY, ETC., APPELLANT

vs.

UNITED ENGINEERING COMPANY, ET AL., APPELLEES

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

(Endorsed:) Filed and entered March 14, 1951. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12646

WARREN H. PILLSBURY, ETC., APPELLANT

vs.

UNITED ENGINEERING COMPANY, ET AL., APPELLEES

Certificate of Clerk, U. S. Court of Appeals for the Ninth Circuit, To Record Certified under Rule 38 of the Revised Rules of the Supreme Court of the United States.

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing forty-eight (48) pages, numbered from and including 1 to and including 48, to

be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of Hon. Philip B. Perlman, Solicitor General of the United States, counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 4th day of June, 1951. [SEAL.]

(S.) PAUL P. O'BRIEN,
Clerk.

In the Supreme Court of the United States

No. — October Term, 1951

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY, ET AL. (HOWARD JOHNSON,
INJURY)

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY, ET AL. (FRANK S. CURNETT
INJURY)

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

MATSON TERMINALS, INC., ET AL. (LOUIS SHALLAT INJURY)

ALBERT J. CYR, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY, ET AL. (CHRIS MANOS INJURY)

Upon consideration of the application of counsel for the petitioners,

It is ordered that the time for filing petition for certiorari in the above-entitled causes be, and the same is hereby, extended to and including 11th day of August 1951.

HUGO L. BLACK,

*Associate Justice of the Supreme
Court of the United States.*

Supreme Court of the United States

No. 229, October Term, 1951

[Title omitted.]

Order allowing certiorari

(Filed October 15, 1951)

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

VOLUME

IV

LIBRARY
SUPREME COURT, U.S.

Volume IV

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

NO. 229

WARREN H. PILLSBURY AND ALBERT A. CYE, DEPUTY
COMMISSIONERS FOR THE THIRTEENTH COMPEN-
SATION DISTRICT, ETC., PETITIONERS

vs.

UNITED ENGINEERING COMPANY, A CORPORATION
FIREMEN'S FUND INSURANCE COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 7, 1951
CERTIORARI GRANTED OCTOBER 15, 1951

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No. 12647

United States
Court of Appeals
for the Ninth Circuit.

ALBERT J. CYR, Deputy Commissioner for the
Thirteenth Compensation District, Under the
Longshoremen's and Harbor Workers' Com-
pensation Act,

Appellant.

vs.

UNITED ENGINEERING COMPANY, a Cor-
poration, and **Fireman's Fund Insurance Com-**
pany, a Corporation,

Appellees.

Transcript of Record

Appeal from the United States District Court
Northern District of California,
Southern Division.

No. 1204

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NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for

Defendant and Appellant.

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EDWARD R. KAY,

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San Francisco, California,

Attorneys for Plaintiffs and Appellees.

In the Southern Division of the United States District Court for the Northern District of California.

No. 29292-G

UNITED ENGINEERING COMPANY, a Corporation,

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Plaintiffs,

vs.

ALBERT J. CYR, Deputy Commissioner for the Thirteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act,

Defendant.

COMPLAINT FOR INJUNCTION PURSUANT
TO TITLE 33, U.S.C.A. SECTION 921

To the Honorable District Court of the United States, Northern District of California, Southern Division:

The plaintiffs, United Engineering Company, a corporation, and Fireman's Fund Insurance Company, a corporation, respectfully show:

I.

Plaintiff, United Engineering Company, at all times herein mentioned has been and now is a corporation; Plaintiff, Fireman's Fund Insurance Company, at all times herein mentioned has been

and now is a corporation. Both of said corporations have their principal offices in the City and County of San Francisco, State of California.

II.

That plaintiff Fireman's Fund Insurance Company, a corporation, at all times herein mentioned, was the Longshoremen's and Harbor Workers' Compensation insurance carrier for said United Engineering Company, a corporation.

III.

On the 22nd day of December, 1947, one Chris Manos, was in the employ of the said United Engineering Company as a longshoreman and on said date was working as such longshoreman aboard the Steamer Purisima on navigable waters of the United States at Alameda, California.

IV.

On said date and at said place and while so employed, the said Chris Manos suffered an injury to his head and neck.

V.

That thereafter on December 23, 1947, plaintiffs herein provided medical treatment to the said Chris Manos for the said injuries.

VI.

That plaintiff United Engineering Company duly filed with defendant a report covering said injuries

in accordance with Section 30 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 930.

VII.

That no compensation payments were ever made to the said Chris Manos or promised by said plaintiffs, or either of them.

VIII.

That on August 17, 1949, a claim for compensation was filed with the defendant Deputy Commissioner by the said Chris Manos alleging that the said injury of December 22, 1947, caused fibrosis, stiffness and improper function of his neck, and light-headedness and drowsiness at all times and further causing other symptoms in his head by reason of which the said Chris Manos claimed that immediately following said injury he was partially disabled.

IX.

That on August 29, 1949, a hearing was duly held before the said Deputy Commissioner at which hearing the said Chris Manos testified that because of said injury of December 22, 1947, he was only able to do light work and that he was not able to carry on his regular duties as a welder; that he continued in the employ of said United Engineering Company until approximately the end of February, 1948, following the said injury and was then laid off with a number of other men; that he was thereafter unemployed for about a week and then went to work for another employer for whom he worked for

approximately another year and was then laid off for lack of employment.

X.

On October 31, 1949, defendant made and entered a compensation order awarding compensation payments to the said Chris Manos as follows:

Federal Security Agency
Bureau of Employees' Compensation
13th Compensation District

Case No. 1366-1142—Claim No. 3281

In the Matter of
The Claim for Compensation Under the Longshoremen's and Harbor Workers' Compensation Act.

CHRIS MANOS,

Claimant,

against

UNITED ENGINEERING COMPANY,

Employer,

FIREMAN'S FUND INSURANCE COMPANY,

Insurance Carrier.

COMPENSATION ORDER AWARD
OF COMPENSATION

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

Findings of Fact

That on the 22nd day of December, 1947, the claimant above named was in the employ of the employer above named at San Francisco harbor, in the State of California, in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Fireman's Fund Insurance Company; that on said day claimant herein, while performing service for the employer as a welder and engaged in ship repair aboard the S.S. Purissima, which was afloat at said harbor, sustained personal injury resulting in disability when he was struck on top of the head by an iron bar falling from above and he suffered strain of the musculature in the cervical region; that written notice of the injury was not given to the employer within thirty days following said injury, but that the employer had knowledge of the injury and has not been prejudiced by lack of such written notice; that the employer furnished claimant with medical treatment, etc., in accordance with the provisions of Section 7(a) of said Act; that the claimant's average weekly wage at the time of his injury was \$62.40; that following said injury claimant herein continued at his regular occupation as a welder for the employer herein and other employers without wage loss until on or about January 31, 1949, at which time, because of the condition of his neck, he was forced to discontinue working as a

welder and seek other and lighter employment; that claimant first became disabled and suffered wage loss as a result of said injury beginning with February 1, 1949; that claim for compensation was filed on August 17, 1949, within one year from the beginning of such disability; that at the first hearing, August 29, 1949, the defendants raised the defense of period of their limitations as prescribed by said Act; that claim for compensation was filed within the one-year period prescribed by Section 13 of the said Act; that as a result of the injury sustained, claimant has a temporary partial disability beginning with February 1, 1949, which is estimated to cause a loss of wage earning capacity of \$15.60 a week, and he is entitled to compensation for such disability at the rate of \$10.40 a week; that compensation due for temporary partial disability from February 1, 1949, to the date of hearing, August 29, 1949, is 30 weeks at \$10.40 a week amounting to \$312.00; that no compensation has been paid.

Upon the foregoing facts the Deputy Commissioner makes the following:

Award

That the employer, United Engineering Company, and the insurance carrier, Fireman's Fund Insurance Company, shall pay to the claimant compensation as follows:

The sum of \$312.00 forthwith, representing compensation benefits accruing to and including August 29, 1949, and beginning with August 30, 1949, the further sum of \$10.40 a week during the continua-

tion of temporary partial disability or until the further order of the Deputy Commissioner.

Given under my hand at San Francisco, California, this 31st day of October, 1949.

ALBERT J. CYR,

Deputy Commissioner, 13th
Compensation District.

Every payment awarded under a Compensation Order earns 20% additional if not paid within 10 days from the date it becomes due.

XI.

That the evidence at the said hearing before the Deputy Commissioner is without conflict that the said Chris Manos sustained injury on the 22nd day of December, 1947, that he received medical treatment therefor, and that he suffered partial disability and symptoms as heretofore described and that no compensation payments were made or promised to the said Chris Manos by the plaintiffs, or either of them.

XII.

That no claim for compensation was filed with the Deputy Commissioner by or on behalf of the said Chris Manos until more than one year after the injury of December 22, 1947, to wit, August 17, 1949.

XIII.

That prior to the first hearing on said claim, plaintiffs pleaded that said claim was barred by the

period of limitations prescribed by the said Longshoremen's and Harbor Workers' Compensation Act.

XIV.

That by the said Compensation Order of October 31, 1949, the plaintiffs herein are ordered to pay forthwith, the sum of \$312.00 to the said Chris Manos as of August 29, 1949, and that the plaintiffs are further required to pay to the said Chris Manos the sum of \$10.40 per week from and after August 30, 1949, during the continuation of the alleged temporary partial disability or until the further order of the Deputy Commissioner.

XV.

Plaintiffs are informed and believe, and upon such information and belief, allege that the said Chris Manos, claimant in the said proceedings before the defendant Deputy Commissioner, to whom compensation payments are ordered to be paid as aforesaid, is a person of no financial means and without property, and if plaintiffs should pay to him the sums awarded in said Compensation Order, such payments could not be recovered and that accordingly plaintiffs would thereby suffer great and irreparable damage and injury if said award and order is not stayed.

XVI.

That the said claim was not filed with the Deputy Commissioner until August 17, 1949, although the

Deputy Commissioner found that claimant was entitled to temporary partial disability beginning with February 1, 1949, a period of approximately nine months, during which time said Chris Manos neglected to make any claim for compensation. The defendant's award, therefore, has placed plaintiffs in the position of being required to pay accrued compensation in the amount of \$312.00 as aforesaid, together with additional payments at the rate of \$10.40 per week from and after August 30, 1949, and indefinitely thereafter.

XVII.

Plaintiffs are informed and believe that an early date for a hearing on the merits of this matter can be had before this Honorable Court.

XVIII.

Plaintiffs believe that there is a great probability that the said Compensation Order of the defendant will be set aside by this Court on the ground that said defendant had no jurisdiction to issue such Order in view of the uncontradicted evidence that the said claim was filed more than one year after the date of said injury and that the claim is therefore barred by the limitations of time provided by the said Longshoremen's and Harbor Workers' Compensation Act.

Wherefore, plaintiffs pray that said Compensation Order and Award be set aside and the same and its enforcement be permanently enjoined and restrained; that in addition, plaintiffs pray that said Compensation Order be suspended and that

an Order be entered for an interlocutory injunction suspending the same during the pendency of this action; that payments required by said order and award, and each of them, be stayed until a final decision has been rendered herein; and it is further prayed that this Court may find and adjudge that the said claim for compensation is barred by the provisions of the Longshoremen's and Harbor Workers' Compensation Act in that it was filed more than one year after the said injury; and that plaintiffs should not be, nor is either of them subject to or liable to pay compensation for said injury to the said Chris Manos; and that said claim is not within the jurisdiction or power of defendant to administer or apply as against the plaintiffs, or either of them; and for such other and further relief as to the Court may seem just.

/s/ JOHN H. BLACK,

/s/ EDW. R. KAY,

Attorneys for Plaintiffs United Engineering Company and Fireman's Fund Insurance Co.

United States of America,
Northern District of California,
City and County of San Francisco—ss.

Geo. Jordan, being first duly sworn, deposes and says:

That he is one of the officers, to wit, Vice President of the Fireman's Fund Insurance Company, a corporation, one of the plaintiffs herein; that he has read the foregoing Complaint for Injunction

Pursuant to Title 33, U.S.C.A. Section 921, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters set forth therein upon information and belief, and as to those matters he believes it to be true.

/s/ GEO. JORDAN.

Subscribed and sworn to before me this 10th day of November, 1949.

[Seal] /s/ ROBERT C. TAYLOR, JR.,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires February 15, 1953.

[Endorsed]: Filed November 10, 1949.

[Title of District Court and Cause.]

MOTION TO DISMISS

Now comes the defendant, Albert J. Cyr, Deputy Commissioner of the United States Employees' Compensation Commission, by his attorneys, Frank J. Hennessy, United States Attorney, and Macklin Fleming, Assistant United States Attorney, for the Northern District of California, and moves this Court to dismiss the Bill of Complaint after review of the Compensation Order filed herein, for the following reasons:

(1) That the Bill of Complaint filed herein does not state a cause of action, and does not entitle plaintiff to any relief, nor does the said Bill of

Complaint state a cause of action against the defendant, Albert J. Cyr, Deputy Commissioner, upon which relief can be granted.

(2) That it appears from the Bill of Complaint including the transcripts of testimony taken before the Deputy Commissioner, the Compensation Order filed by him on the 31st day of October, 1949, complained of in the Bill of Complaint, was supported by evidence, and under the law said findings of fact should be regarded as final and conclusive.

(3) That it appears from the Bill of Complaint, including said transcripts of testimony, that said Compensation Order complained of herein is in all respects in accordance with law.

(4) For such other good and sufficient reasons as may be shown.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ MACKLIN FLEMING,
Assistant U. S. Attorney.
Attorneys for Defendant
Albert J. Cyr.

This motion will be based on the complaint and pleadings now on file in this matter and the certified copy of the transcript of the proceedings in the case before Deputy Commissioner Albert J. Cyr, which defendant intends to introduce in evidence as defendant's Exhibit A.

[Endorsed]: Filed January 13, 1950.

In the United States District Court for the Northern District of California, Southern Division

No. 29292-Civil

UNITED ENGINEERING COMPANY, a Corporation, et al.,

Plaintiff,

vs.

ALBERT J. CYR, Deputy Commissioner, etc.,
Defendant.

Appearances:

JOHN H. BLACK,
EDWARD R. KAY,

233 Sansome Street,
San Francisco, California,

Attorneys for Plaintiffs:

FRANK J. HENNESSY,

United States Attorney.

EDGAR R. BONSALE,

Assistant United States Attorney.

MACKLIN FLEMING,

Assistant United States Attorney,
San Francisco, California.

Attorneys for Defendants.

OPINION

Goodman, District Judge.

In these four consolidated actions, the plaintiff employers, and their respective insurance carriers have asked this court to set aside and enjoin the enforcement of Compensation Orders and Awards made by the Deputy Commissioner pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424; 33 USC 901-950. The question presented is whether the Deputy Commissioner lacked jurisdiction to make the awards because the claims for compensation were not filed within a year after the claimants were injured as is allegedly required by Section 13(a) of the Act. The Deputy Commissioner has moved to dismiss the complaints on the ground that the claims were timely filed and that therefore the awards were proper.

Section 13(a) of the Act provides that "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefore is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred." (Emphasis added.)

For a proper understanding of the issues presented, a brief account of the injuries suffered by

the claimants and the events leading up to the compensation awards is here necessary.

Claimant Howard Johnson on May 12, 1947, struck his head on a cross-beam of the vessel Monterey while working as a leaderman welder. The muscles of his neck were severely strained and he was unable to continue to weld aboard ship. His employer transferred him to lighter work in the machine shop at no reduction in wages. Although his neck continued to trouble him, he continued to work regularly for more than a year until he was discharged by the new owner of the ship yards because he was unable to weld aboard ship. Since that time he has been employed only intermittently because he is physically able to perform only the less strenuous types of welding operations. When Johnson first lost time from work, he was told it was too late for him to file a claim for compensation. But when he discovered how many employment opportunities were lost because of his condition, he decided to attempt to secure compensation. On January 31, 1949, more than a year and a half after the accident, he filed his claim with the Deputy Commissioner.

Claimant Frank Curnutt on February 17, 1947, while employed as a sheetmetal worker aboard the S. S. Lurline, wrenched his back when he lifted a pre-heater from the deck to a table. He did not work for several days. When he returned to his job, he was relieved of all heavy work on doctor's orders. With some discomfort, he performed lighter duties at his former wage rate until his job ended

in about a year. After resting for two weeks to give his back a chance to heal, he obtained work with the Bethlehem Steel Company. In June of 1948, he quit work for five weeks, as a therapeutic measure suggested by his physician. In July he went to work for a sheet-metal company, but soon was forced to give up this job, and subsequent ones, because the work proved too strenuous. On January 17, 1949, nearly two years after injuring his back, Curnutt filed his claim for compensation.

Claimant Louis Shallat on November 21, 1947, while working as a stevedore aboard the S. S. Mauna Lei, caught his hands between a sling and a bight. Considerable pain and swelling in his hands resulted. According to Shallat, his left hand has pained him continuously since it was injured and he has applied self-treatment. While he testified at the hearing before the Deputy Commissioner that the injury grew "more and more severe," he also stated that "the left hand is still the same as it was when I got injured." Shallat had lost no time from work up to the date of the final hearing before the Deputy Commissioner. At that hearing, Shallat stated that he did not file his claim for compensation until May 23, 1949, nearly a year and a half after he was injured, because he thought the injury "wasn't so serious," and that "it would work its way out."

Claimant Chris Manos was welding on the deck of the tanker Purisima on December 22, 1947, when he was struck on the head by an iron saddle falling from above. He was instructed by the examining

physician not to weld thereafter and consequently was given lighter work by his employer. He suffered no reduction in rating or wages. About two months later his employment terminated as a result of a general reduction in the number of men employed at the ship yard. In a week or so he obtained a shop welding job at a slightly higher wage than he had previously received at the ship yard. This job ended in January of 1949, due to a general lay off. At the time of the hearing before Deputy Commissioner on August 29, 1949, Manos was still unemployed, but was planning to engage in sales work. Manos' neck has troubled him continually since he was struck on the head and he has received regular medical treatment. In some respects the condition of his neck apparently gradually has improved and in others it has grown worse. Manos filed a claim for compensation on August 17, 1949, more than a year and a half after he was injured.

The Deputy Commissioner justified his awards to these claimants and now grounds his motion to dismiss these complaints on his conclusion that Section 13(a) of the Compensation Act sets the one-year period of limitation running, not from the date of injury, but from the date on which the injury became compensable. There may be merit to this interpretation of Section 13(a) but these causes can be determined without reaching the question.

In my opinion, the Deputy Commissioner erred in assuming that the injuries suffered by these claimants were not compensable so long as they con-

tinued to work with no reduction in wages. It is now settled law in this Circuit that a claimant is not precluded from recovering compensation under the Act because he has been paid his old wages at all times since resuming work after being injured. *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 F.2d 513 (1939). Accord, *Luckenbach S. S. Co. v. Norton*, 96 F.2d 764 (3 Cir. 1938); *Hartford Accident and Indemnity Co. v. Hoage*, 85 F. 2d 420 (App. D. C. 1936). The Act says nothing about "compensable injuries" but only provides that compensation must be paid for disability. Disability is defined by Section 2(10) as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." The statute makes earning capacity the test. Earning capacity may be properly defined to mean ability to earn, rather than wages actually received. And this means ability to earn in the open labor market, not ability to secure exceptional consideration from a sympathetic employer.

Although their employers did not reduce their wages, claimants Johnson, Curnutt, and Manos were physically unable, following their injuries, to perform the same duties they had previously performed. Pain and suffering were continuous. They were well aware that unless there was improvement in their physical condition, they would be unable to again engage in strenuous activity. Claimant Manos admitted that he was told by the physician, who examined him following his injury, that he could obtain compensation. Instead of doing so, at the same physician's suggestion, he sought and ob-

tained from his employer lighter work at his former wages.

Claimant Shallat apparently continued to perform the same duties following his injury as he had before. But, if his statements to examining physicians are accepted as true, he was in constant pain. The Compensation Act does not deny relief to an injured workman until his pain exceeds endurance.

All four of the present claimants have been disabled within the meaning of the Longshoremen's and Harbor Workers' Compensation Act since the day they were injured. Consequently they had compensable claims.¹ Such claims were not timely filed. It follows that the awards of the Deputy Commissioner were not within his power to make. The court is aware of the well established rule that the Deputy Commissioner's findings of fact should not be disturbed if there is any substantial evidence to support them. But his conclusion that these claimants suffered no disability until long after they were injured is based on an error of law. The undisputed factual record shows that the earning capacity of these men was impaired from the time of injury.

The delay in the filing of these claims is wholly understandable. None of these claimants appear to have been fully aware of his rights and obligations under the Compensation Act. And, even had these men realized the consequences of delay, it is only natural that they should hesitate to jeopardize their

¹See *Liberty Mutual Insurance Co. v. Parker*, 19 F. Supp. 686 (Md. 1937) in which the same conclusion was reached on somewhat similar facts.

opportunity to continue working at their former wage rate by pressing claims for compensation. In a relatively short time the wages of these claimants would have equaled the maximum awards they could ever hope to receive. These, however, are considerations for the lawmakers and not for the Courts.

The motions to dismiss are denied and the awards are severally set aside and vacated.²

Dated May 10, 1950.

[Endorsed]: Filed May 11, 1950.

²The above order in fact fits the issues raised by the pleadings. But in order to technically comply with the rule announced by our Court of Appeals in *Twin Harbor Stevedoring & Tug Co. v. Marshall*, supra, the causes are transferred to the Admiralty docket, the motions will be treated as exceptions and are overruled and a decree will enter vacating and setting aside the awards.

In the United States District Court for the Northern District of California, Southern Division

No. 29292

UNITED ENGINEERING COMPANY, a Corporation, et al.,

Plaintiff,

vs.

ALBERT J. CYR, Deputy Commissioner, etc.,
Defendant.

ORDER AND DECREE

In the above-entitled case the motion to dismiss is denied and the award is severally set aside and vacated.

It is further ordered that the above-entitled case is transferred to the Admiralty docket, the motion will be treated as exception and is overruled and a decree is hereby entered vacating and setting aside the award.

Dated at San Francisco, California, this 11th day of May, 1950.

/s/ LOUIS E. GOODMAN,

United States District Judge.

(As amended by order of August 23, 1950.)

[Endorsed]: Filed May 11, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Albert J. Cyr, Deputy Commissioner for the Thirteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, defendant in the above-entitled action, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final order of this Court filed on May 11, 1950, denying the motion of the defendant to dismiss the complaint and vacating and setting aside the order of the defendant awarding compensation dated, October 31, 1949.

Dated: July 3, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ EDGAR R. BONSALE,
Assistant U. S. Attorney.
Attorneys for Defendant.

[Endorsed]: Filed July 3, 1950.

United States Federal Security Agency, Bureau of
Employees Compensation Before Albert J.
Cyr, Assistant Deputy Commissioner, 13th
Compensation District

Case No. 1366-1142

Claim No. 3281

August 29, 1949

CHRIS MANOS,

Claimant,

VS.

UNITED ENGINEERING CO.,

Employer,

FIREMAN'S FUND INSURANCE CO.,

Insurance Carrier.

TRANSCRIPT OF TESTIMONY
AT HEARING

Pursuant to notice, this matter was heard before
Albert J. Cyr, Assistant Deputy Commissioner,
Bureau of Employees Compensation, at the Cor-
oner's Court, at 480 Fourth Street, Oakland, Cali-
fornia, on Monday, the 29th day of August, 1949,
at 2 p.m.

Appearances:

Claimant present in person.

Defendants represented by B. W. Greenough.

Mr. Cyr: This will be a hearing on an applica-
tion filed by Chris Manos because of an injury
occurring on December 22, 1947, while he was em-

ployed as a welder by United Engineering Company.

This injury occurred on board ship on navigable waters of the United States and the case is under the jurisdiction of the Deputy Commissioner of the 13th Compensation District.

At the time of this injury the employer was insured for compensation under the Longshoremen's and Harbor Workers' Compensation Act through Fireman's Fund Insurance Company.

Medical treatment has been furnished by defendants.

No compensation has been paid.

Your claim, Mr. Manos, is that you have some partial disability because of that injury?

Mr. Manos: That is right.

Mr. Cyr: Your main trouble is in stiffness in the neck, is it?

Mr. Manos: I always have a drowsy feeling like I am falling asleep, or something, always a hanging feeling. My neck feels like cracking ice when I turn it, push it beyond a certain point.

Mr. Cyr: What is your position on this claim, Mr. Greenough? [2*]

Mr. Greenough: We raise the issues of liability for compensation and medical expense, and nature and extent of disability, and plead the claim is barred by the statute of limitation.

Mr. Cyr: With respect to the issue of statute of limitation, Mr. Greenough, the defendant's representative, informs me that that case was reported

* Page numbering appearing at bottom of page of original Reporter's Transcript.

to the Deputy Commissioner as a no time lost case on December 30, 1947, on the regular form U. S. 202. This information will be checked in our closed files, and also the record will show that Mr. Manos filed his claim for compensation benefits with the Deputy Commissioner on August 17, 1949.

CHRIS MANOS,

claimant, having been first duly sworn, testified as follows:

Mr. Cyr: Q. Your name is Chris Manos?

A. Yes.

Q. You live at 3550 Harper Avenue, Oakland, California?

A. Yes.

Q. You sustained an injury on December 22, 1947, while working for United Engineering Company?

A. Yes.

Q. And you were at the time working on a tanker?

A. Yes. [3]

Q. That was a completed tanker, you were working on ship repair on the tanker?

A. Yes.

Q. What happened to you? Tell us very briefly.

A. I was welding up on top. I had my head down and sitting on the deck. An iron saddle fell all the way down, knocked my head down as far as it could go. A couple of other workers there they knocked the iron saddle off down on my head, and it hit me on my right side and it pushed my neck further than it was supposed to go.

Q. At what time of the day was that?

(Testimony of Chris Manos.)

A. I don't exactly remember. I think it was towards evening.

Q. Did you finish the day's work?

A. I believe I went to the hospital there. I don't know whether it was on Saturday, or what, and then they took me—

Q. You say you went to the hospital there. You mean the station in the yard?

A. Yes, and the boss was right there, and then sent me to Dr. Lum and Dr. Jones, and he examined me and said I had contusions. I did not have no reflexes when he examined me, and from there within the next day or couple of days. I don't remember exactly, he sent me [4] for X-rays at Alameda Hospital. Then this crunching feeling that I had in my neck wasn't present right then. It started developing more and more as time went along. So Dr. Lum referred me to Dr. Stehr, which I am still going to Dr. Stehr still now.

Q. Did Dr. Stehr treat you, or just have you under observation?

A. Well, he stretches me and put me—I don't know what it is called—it is a silo—they lift me off the ground and stretch the neck and turn it.

Q. How often do you go to Dr. Stehr?

A. Every two weeks.

Q. You have been going to him ever since you were hurt?

A. Yes.

Q. Right after the injury of December, 1947, did you keep on working for United Engineering?

A. Dr. Lum and Dr. Jones told me not to weld,

(Testimony of Chris Manos.)

that they would put me on compensation, but if the company saw fit to give me an easy job, but not to get up on heights, to go ahead and take it because the difference would support my family, and all that, and it would be better if I could continue work. So I told the boss about it, and they did. They were pretty nice about it. They let me just line up the other fellows for work. [5]

Q. You say line up the other fellows for work, but your rating stayed as a welder?

A. That is right.

Q. The same rate of pay?

A. That is right.

Q. Then you kept on working for United Engineering? A. Yes.

Q. For how long?

A. A couple of months later.

Q. What happened a couple of months later?

A. They let more or less the whole yard off. From there I went to work for Peterson, a contractor in Hayward.

Q. Did you lose any time at all between the time you stopped working for United Engineering before you went to work for Peterson?

A. Maybe a week to get a job.

Q. What did you do for Peterson, Contractor?

A. Well, it was—you had to do everything. I mean layout, paint, weld, everything. It was a shop job.

Q. You were working as a welder?

A. Yes, welder too.

(Testimony of Chris Manos:)

Q. Did you get that job through the Union?

A. Yes, it is a union shop.

Q. As a welder? A. That is right. [6]

Q. And made the union scale wage?

A. That was a little higher. It was a shop job.

Q. A little higher than you were getting at United Engineering?

A. A little bit, a few cents.

Q. How long did you work for Peterson?

A. I worked about a year. A year, I would say. I still made my visits to Dr. Stehr. I was going once a week then.

Q. What happened after you left Peterson? What happened there? Were you terminated or did you quit?

A. They started to lay off there too, so things are pretty well closed up lately as far as work, but I will say I am falling in with another fellow to go in the selling game because I know welding is against my physical condition. I mean it does bother me, so I might as well go to selling.

Q. Have you done any work at all for wages since you left Peterson? A. No.

Q. Do you recall the date when you left Peterson? A. About six months.

Q. About six months ago?

A. About six months ago. I drew unemployment.

Q. About six months ago. That would be some time in February? [7]

A. Something like that. Well, let me see—I

(Testimony of Chris Manos.)

might have the date. It was the latter part of January.

Q. And you say you haven't worked for wages since then?

A. No, because, as I say, this fellow is going to put me in his business. He is a manufacturer and he is a good friend and he knows about the case and figures I should go selling, or something like that.

Q. I think you told me that your only trouble now is stiffness in the neck and a sort of drowsy feeling?

A. Yes, I feel drowsy all the time and sometimes it seems like I cannot get my proper step in walking, and it just clicks like crushing ice in there all the time, every move. It just crunches.

Q. You are still going to Dr. Stehr?

A. That is right.

Mr. Cyr: Mr. Greenough?

Mr. Greenough: Q. You said, Mr. Manos, that you did not notice this sensation of cracking ice in the neck at the time of your first treatment?

A. It just kept coming on.

Q. Do you remember when you first noticed it, approximately?

A. Well, the first I noticed was just clicks, just one little spot, and it started developing more and more, and now there is a real tight feeling as she comes as far [8] as I can turn it to the right or left.

(Testimony of Chris Manos.)

Q. You couldn't say when you first developed that?

A. Right along, but just come not right at first, but since it started it continued getting worse and strong.

Q. You say your neck was crushed too far when you were struck by that saddle?

A. In other words, I was sitting on my leg on the floor on the deck, and what happened, the thing hit me here and pushed me all the way down:

Mr. Cyr: Q. Pushed your head down as far as it could go, all the way?

A. Pushed my head down.

Mr. Greenough: Q. Do you remember when you first saw Dr. Stehr, approximately?

A. I went February 19, 1948.

Q. When did you say you left United, or did you state exactly?

A. They wouldn't tell me. I tried to find out, but they told me that their records are some place—Todd, or somebody has them.

Q. Was it the time Todd took over the yard or before that?

A. Before that. They told me all the records are at 500 Beale Street, San Francisco.

Q. You don't even remember the approximate date then? [9] A. When I left?

Q. Yes?

A. Approximately the end of February, 1948, I imagine, somewhere in there.

(Testimony of Chris Manos.)

Q. You were off about a week that time seeking work?

A. About a week, as close as I remember.

Q. Since the latter part of January, this year, have you tried to find work? A. Yes, I tried.

Q. You are registered for unemployment insurance?

A. Yes, that is right. I drew unemployment.

Q. When did you first come to the United Engineering Company office to inquire about compensation, or did you inquire?

A. The first I heard about it was the doctor asked me. I didn't know nothing about compensation. He asked me if anybody got in touch with me as to my case.

Q. You just answer the question if you can. Do you recall the date on which you came to the United Engineering office, approximately?

A. I went to Frisco.

Q. When?

A. It was the same day this was filed. The Matson people sent me over.

Mr. Cyr: Q. The same day you came to our office? [10] A. The same day, yes.

Q. That was the 17th day of August, 1949?

A. Yes.

Q. We took your claim that day you came in?

A. Yes.

Mr. Greenough: Q. That was the first time you made any inquiry of the company about compensation? A. That is the day.

(Testimony of Chris Manos.)

Q. You hadn't made any inquiry from the Fireman's Fund Insurance Company prior to that time?

A. No. I just went to the Matson people.

Mr. Greenough: No further questions.

Mr. Cyr: Q. You say that you left United Engineering sometime that you recall February, 1948, you were off about a week until you connected up again with Peterson, contractor? A. Yes.

Q. That week you were off work you were looking for work all along, and it took about a week to connect?

A. I don't remember exactly. I did go to Local 681 and look for work there, and at that time everybody was laying off. I don't remember the exact time but it wasn't very long, and I had to join another Union to get this other job. I joined the General Operative Engineers in order to go to work. [11]

Q. But it was not your neck kept you off work during that work, whatever it was?

A. No. I had to go to work. I had a family.

Q. You also brought out a while ago the doctor mentioned to you something about compensation or your case?

A. He just mentioned the fact if I heard anything because he told me that clinically he cannot say I am getting better, or clinically he wouldn't say I am getting worse. In other words, there isn't much he can do about it. I would have inquired before. I went on the strength of the doctor's

(Testimony of Chris Manos.)

word, that time would have healed my neck. Otherwise I would have looked into before that for something else.

Q. Just what did Dr. Stehr tell you then about your case?

A. He told me he diagnosed my case as a fibrosis, or something like that. So I asked him, well, I want to know what is the worst that could develop out of my neck, the worst, and he told me the worst that could develop on the neck would be either rheumatism or rheumatics, in that category. That is what I was concerned about, just what it could develop to.

Q. Just when did you have that conversation with Dr. Stehr, do you remember? [12]

A. He told me he wrote over, or something like that, to Frisco. That is all he said. He asked if I heard anything. I imagine he didn't know whether to send me to another doctor, or what. I said, no, I never heard anything.

Q. What did you do after that about your case?

A. Six months ago Dr. Stehr felt that the time element would be the only thing to determine whether it would get better or worse. So he asked me then once if I heard from anybody, and I didn't exactly understand what he meant anyway, and I told him, "If you can operate on my neck, go ahead and operate, clear it up," and he felt that an operation if it did clear up it might just clear it up for a short time and might come back again, so he didn't think it advisable. Then he mentioned again

(Testimony of Chris Manos.)

about the time. He wanted to send papers, I guess, for another doctor, or whatever he was going to do. I don't know. I says, "Well, do you think you could help me still by coming?" He says, "Well, it is up to you, Manos, if you want to continue coming for another six months, we will see how your neck gets in six months." So I just took it on the strength of his word. I wanted to see if time would make me feel better, but it is no better. It is worse.

Q. Am I to understand, then, it was just recently [13] or just shortly before you came in to see us you had a final conversation with Dr. Stehr about your case?

A. It is not final. I am still his patient. I am still going. I asked him what the worst could happen to my neck. I said, "Doctor, I think you should tell me that."

Q. About how many days was that before you came to our office?

A. I heard something similar to that, say, six months before I came to your office, six months where I just let it go to see what it would do. I was interested in my neck.

Q. What finally prompted you to come in to see us and see the Matson people in San Francisco?

A. I wanted to find out one way or other. I was afraid, like he went through this sort of thing, I didn't know anything about compensation laws and all that, and he told me if I went over to see the Commissioner, so when he told me that I asked

(Testimony of Chris Manos.)

the doctor about that, and I think that is how, more or less, it came about.

Q. You say you asked the doctor. That would be a few days before you finally came in to see us?

A. Six months.

Q. And after a friend of yours suggested to you to come in to see the Commissioner you waited six months. That is what I want to get straight.

A. In other words, this friend of mine said the Commissioner would contact me.

Q. How long ago was it this friend told you that?

A. Quite a while back. I don't remember exactly.

Q. A month ago?

A. No, I wouldn't know offhand, but like I say, I don't know nothing about questions. Still doesn't make no difference, just getting my neck fixed up, that is all I am worried about.

Q. (Mr. Greenough): You say now that your condition is practically the same as it was the last of January?

A. It isn't getting better. The muscles, whatever it is, are getting stiffer, tighter. The way I honestly feel, I don't feel it will ever get better.

Q. You haven't noticed much difference?

A. No, never get better.

Q. (Mr. Cyr): You haven't noticed any change since you stopped working for Peterson?

(Testimony of Chris Manos.)

A. It has changed for the worse, I would say. My neck to the right is stiffening up on me now. Whereas the first stiffness I noticed was one side, now it is also on the opposite side, getting there too. See, it is getting that side.

Q. I have one more question. What was your wage rate when you were hurt, do you remember? You put in [15] your claim \$12.50 a day. What was the hourly wage, do you remember?

A. Let me see. I don't exactly remember. The wage scale changed so often, I don't remember that. I think it was something like \$1.76, or something.

Q. But in December, 1947, you were working straight time, 40 hours a week? There was not much overtime in 1947?

A. Yes, there was overtime then. We were working quite a bit overtime at the time. We were working Saturdays and working Sundays.

Mr. Cyr: Any more questions, Mr. Greenough?

Mr. Greenough: No.

Mr. Cyr: I want to put medical reports in evidence:

Report of Dr. D. D. Lum, of December 23, 1947, as Exhibit "A";

Report of Dr. V. C. Stehr, March 9, 1948, Exhibit "B";

Another report of Dr. V. C. Stehr, of February 18, 1949, Exhibit "C";

Report of Dr. V. C. Stehr, of April 25, 1949, Exhibit "D";

Final report of Dr. V. C. Stehr, of June 27, 1949, Exhibit "E".

(Testimony of Chris Manos.)

Q. (Mr. Cyr): You are still reporting to Dr. Stehr?

A. Yes.

Q. Once a week? [16]

A. Once every two weeks.

Q. Well, you keep on doing that.

I hereby certify that the foregoing is a correct transcript of the testimony and proceedings taken in the above matter at the hearing held on the 29th day of August, 1949.

/s/ L. P. SMITH,
Reporter.

EXHIBIT "A"

Copy of excerpts from report of Dr. D. D. Lum, December 23, 1947:

"6. Date of accident: 12-22-47.

"7. State in patient's own words where and how accident occurred: Couple of workers dropped a piece of iron on patient's head.

"8. Give accurate description of nature and extent of injury and state your objective findings: No evidence of injury.

"18. Was patient treated by anyone else? No.

"19. Was patient hospitalized? No.

"21. Is further treatment needed? Yes. For how long? 2 weeks.

"22. Patient will be able to resume regular work on: No time lost.

/s/ D. D. LUM,

"MD."

EXHIBIT "B"

Copy of report of Dr. V. C. Stehr, March 9, 1948:

"Mr. Chris Manos, a welder, employed by the United Engineering Company was living at 387 Cockman Road, San Lorenzo, California, was examined in this office on February 19, 1948.

"History: Mr. Manos stated that in November, 1947, while he was working as a welder for the United Engineering Company, he was injured when a large iron saddle was dropped a distance of about four feet striking him on his head, causing his neck to be acutely flexed in a forward direction. The patient stated that he was momentarily dazed but not rendered unconscious. He stated that he was seen at the offices of Dr. Lum and Dr. Jones of Alameda, and that X-rays were taken at the Alameda Hospital on January 19, 1948, and also on January 30, 1948. According to the patient's statement, he received heat treatments to his neck at intervals of three times a week and then this was reduced to intervals of twice a week. He does not feel that the physiotherapeutic treatments offered him afforded him any great relief. Mr. Manos stated that he has lost no time from his work but during the first two weeks following his accident he was unable to carry out his usual duties, in a normal manner.

"Past Medical History: The past medical history reveals an appendectomy to have been performed six years ago. The tonsils and adenoids

were removed as a child and he received stomach ulcer treatments while in the service.

“Present Complaints: His present complaints consist of:

1. A sensation of ice being crushed in his neck when he rotates his head to his left.
2. Occasional headaches which occur at intervals of twice a week after his working day.
3. A feeling of heaviness about the eyes as if his eyelids would close.
4. Dizziness at times.

Physical Examination: Physical examination reveals a well developed, well nourished white male of 28 years of age, 5' 10" tall and weighing about 170 pounds. He does not appear to be in any acute distress, he moves about the office easily, and is cheerful and cooperative during the examination.

The head is of normal contour, there is no remaining evidence of injury to the skin of the scalp. There is no tenderness of the underlying skull. Sensation of the skin of the scalp and face is intact. The facial muscles possess their normal innervation. The pupils are round and equal and react to light and accommodation. The extraocular muscles function in a normal manner. The nose is not deformed or obstructed. The mouth reveals the teeth to be in good state of repair. The pharynx is clear. The hearing is unimpaired in either ear. There is no muscle spasm present in the neck, slight tenderness is elicited upon deep palpation over the mid-cervical spine both on the right and left sides. Flexion and extension are complete.

Rotation of the cervical spine to the left reveals a soft grating crepitation followed by a rather sharp snap. The patient states that he does not experience any particular pain when these various sounds occur. The chest is symmetrical with good expansion that is equal bilaterally and is clear to auscultation.

The heart sounds are of good character. The abdomen is round and soft. There is a well healed scar in the lower quadrant of the abdomen indicating the site of a previous surgical intervention for an appendectomy.

The back is well muscled, there is no localized tenderness present. The motions of the back are performed in a free and painless manner. The upper and lower extremities do not reveal any pathological changes of note. Reflexes are present active, and equal bilaterally. There are no abnormal reflexes present. Sensation of the skin of the arms and legs is normal.

X-Ray Examination: X-ray films were made at the Alameda Hospital of the skull and cervical spine on January 19, 1948, and January 30, 1948, were reviewed. The X-rays of the skull do not reveal any evidence of fracture or other bone disease. There is some irregularity of bone structure involving the intra-articular facet between the fifth and sixth cervical vertebra as seen in one of the oblique films. This does not have the appearance of a recent fracture. The other views of the cervical spine fail to reveal any abnormalities.

Diagnosis: 1. Probable rupture of the ligaments about the intraarticular joints between the fifth and sixth cervical vertebra.

Comment: There is no evidence of residual intracranial injury at the time of this examination. The function of the cervical spine is within normal limits. The noise resembling crushed ice which the patient complains of in his neck could possibly be due to hypermobility at an intervertebral articulation with hypermobility at the joint involved. There is no specific treatment indicated at this time. The patient obviously can carry on his usual occupation in a satisfactory manner. It would be well to re-examine this patient after a period of about six months in order to re-evaluate his symptoms and clinical findings. It would be well at that time to determine whether any permanent disability exists.

/s/ V. C. STEHR,
M. D."

EXHIBIT "C"

Copy of report of Dr. V. C. Stehr, February 18, 1949:

"This letter is to inform you on the progress in the case of the above-named patient.

"Mr. Chris Manos visited this office again on February 12, 1949. He stated at the time of this visit that he continues to experience various complaints in relation to his neck and head. These consist of: 1) A 'funny feeling' in his neck, 2) Some stiffness on twisting his neck to the left, associated with some

limitation of motion, 3) Crepitation in the neck when the head is rotated to the left, 4) Occasional feeling of heaviness of his head.

"He states that he does not feel that there is going to be any further improvement in his condition.

"Examination at this time indicates the patient to carry his head in a relatively normal manner. The neck is in the midline. Flexion and extension are complete. Lateral tilting is free and equal bilaterally. There are about 10 degrees limitation of left rotation. Occasionally, a faint click can be heard on this motion. There is no muscle spasm noted in the neck.

"Manipulations under traction of the neck have been performed in this office at each visit that he makes. It is noted that on rotation of the neck to the left under traction that a mild click is noted, which appears to be towards the lower portion of the cervical spine on the left. When the neck is passively manipulated to the right, considerable crepitation is noted.

"This examiner is of the opinion that there has been some improvement in the condition of the neck, during the past month. This progress, of course, has been slow, but I feel, very definite. The complaints of pain have diminished and have become of the nature of unusual sensations. The marked crepitation which was originally noted has decreased considerably. It is my feeling that further time must be given for healing, and that intermittent stretching and manipulation of the neck are in order. I would suggest that after an additional period of

four to five months, a suitable settlement be attempted. I feel that the patient will probably have some persistent crepitation of a minor nature in his neck, and that he will continue to complain of discomfort in relation to the motion of the cervical spine, until a settlement has been obtained.

"/s/ V. C. STEHR,
"M. D."

EXHIBIT "D"

Copy of report of Dr. V. C. Stehr, April 25, 1949:

"This letter is furnished to acquaint you of the progress in the case of the above-named patient.

"Mr. Chris Manos was last seen in this office on April 16, 1949. There has been no appreciable change in the condition of his neck during the past several months. At times, he states, that there seems to be somewhat more stiffness present, and the crepitation continues in the usual severity.

"The examination at the time of his last visit indicates the patient to hold his neck in a rather normal position. There is about a 20 per cent limitation of rotation to the left, and slight amount of stiffness in rotation to the right. Extension is performed with some hesitancy; flexion is good. Tilting both to the right and to the left is relatively good. When the cervical spine is rotated from the midline towards the left, a mild crepitus can be heard. There does not appear to be any undue pain or discomfort associated with this crepitation.

"The treatment during the past month has consisted of manipulation of the cervical spine under head traction. This treatment has been based on the idea that the patient's disability has been primarily that of the chronic ligamentous sprain involving the articular facets of the cervical spine. I feel that it has been possible by means of this treatment to maintain the greatest amount of mobility in the neck and the degree of crepitation has been lessened to some degree.

"At the time of the patient's last visit to this office on April 18, 1949, several lateral projections of the neck were made with the neck in flexion and extension. These X-rays indicate the neck to function in a satisfactory manner. There is no indication of any subluxation of the intervertebral articulation occurring in either complete flexion or extension. There has been no calcification occurring in the anterior longitudinal ligaments or about the ligamentous structures about the intervertebral joints.

"It continues, therefore, to be my opinion that disability is primarily on the basis of scar tissue formation on the sprained ligaments of the neck. It is very difficult to estimate accurately what the final outcome of this will be. It seems very likely now after having observed him for a considerable period of time, that he will have some permanent restrictions of motion of his cervical spine, and that at intervals he may expect to have some increased discomfort which will gradually subside with the continued use of the neck in a normal manner. It would

seem, to me, to be desirable if some type of settlement can be effected during the near future.

/s/ V. C. STEHR,
M. D."

EXHIBIT "E"

Copy of report of Dr. V. C. Stehr, June 27, 1949:

"This letter is furnished you to acquaint you with the progress in the case of the above-named patient.

"Mr. Chris Manos last visited this office on June 24, 1949. He stated at the time of this visit that he has been experiencing more sensations of light head-
edness as well as associated limitation of motion of his neck. It is his feeling that there has been some deterioration of the condition of his neck during the past several weeks.

"He states that with the motion of his neck, he experiences pain and discomfort in the left side of his neck, primarily being more acute at the mid-cervical level. He is also aware of limitation of motion of the neck in extension.

"Examination at this time indicates the patient to hold the neck in a somewhat guarded manner. There is no true muscle spasm present. There is tenderness on deep palpation on the left lateral posterior portion of the neck involving almost the entire cervical spine. This is most pronounced, however, at the level of about the third and fourth cervical vertebrae. There is tenderness, but to a slightly less degree, on the right side of the neck at this level.

"Extension of the cervical spine presents about a 15 per cent limitation of motion; left rotation, about 5 per cent limitation of motion. Forward flexion and right rotation are within normal limits. Tilting of the neck to the left is slightly less free than to the right. There are no symptoms or physical findings of nerve disturbance in the upper extremities.

"The repeated X-ray studies of the cervical spine of this patient have never revealed a fracture involving the cervical vertebra. The last X-ray examination was performed in this office on April 18, 1949. These films bear the number 4401. The radiographic examination was conducted with the cervical spine in complete flexion and in as much extension as the patient could produce. This study does not show any unusual calcification of the ligaments in the neck and indicate the normal curve to be present in the position.

"Clinical examination, with the patient rotating his neck in various directions, produces an audible crepitation. This is also noted to the palpating hand during the rotation of the cervical spine.

"It has been the feeling of this office from the start that this man sustained ligamentous injuries involving the ligaments and capsules about the mid-cervical spine at the time of his injury, which is now about three years ago. Clinically, he has not demonstrated any significant increase in limited function, but the complaints of the patient have been very constant.

"Treatment has consisted of physiotherapy treat-

ments and neck stretchings with manipulations under head traction in this office. These treatments have maintained, to a very good degree, the mobility of the cervical spine with the exception of the limitations which have been noted above.

"Because it is our feeling that this man's disability is primarily on the basis of ligamentous injury with fibrous contracture, he is now being placed on a course of deep X-ray therapy with the hope of causing some shrinking of the scar tissue which, we believe, is present.

"He has been able to perform a moderate amount of work during the past year, but, at the present time, is unemployed.

"A report will be furnished you concerning his response to deep X-ray therapy.

/s/ V. C. STEHR,
M. D."

[Endorsed]: Filed September 6, 1949.

[Title of District Court and Cause.]

**CERTIFICATE OF CLERK TO RECORD
ON APPEAL**

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the appellant, to wit:

Complaint for Injunction Pursuant to Title 33,
U.S.C.A. Section 921.

Motion to Dismiss.

Notice of Appeal.

Statement of Points on Which Appellant Intends
to Rely and Designation of Parts of the Record
Necessary for the Consideration Thereof.

Defendant's Exhibit A—Deputy Commissioner's
Certification of Pleading, Transcript of Testimony,
Exhibits (A, B, C, D and E), and Decision.

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court this
10th day of August, A.D. 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12647. United States Court of
Appeals for the Ninth Circuit. Albert J. Cyr, Dep-
uty Commissioner for the Thirteenth Compensation
District, under the Longshoremen's and Harbor
Workers' Compensation Act, Appellant, vs. United
Engineering Company, a Corporation, and Fire-
man's Fund Insurance Company, a Corporation,
Appellees. Transcript of Record. Appeal from
the United States District Court for the Northern
District of California, Southern Division.

Filed August 9, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States District Court for the Northern District of California, Southern Division

No. 12647

ALBERT J. CYR, Deputy Commissioner, et al.,

Appellant,

vs.

UNITED ENGINEERING COMPANY, a Corporation, et al.,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF PARTS OF THE RECORD NECESSARY FOR THE CONSIDERATION THEREOF

Appellant states that he intends to rely upon the following points on appeal:

1. That the District Court erred in failing to give finality to findings of fact of the deputy commissioner supported by evidence.
2. That the District Court erred in reevaluating the evidence before the deputy commissioner, and in making different fact conclusions from those found by the deputy commissioner.
3. That the District Court misconstrued the law as to when the time for filing claim for compensation begins to run.

4. That the District Court erred in denying the motion to dismiss the complaint and in setting aside the compensation order complained of.

5. Appellant designates the following parts of the Record as necessary for consideration of the above points.

1. Complaint.

2. Defendant's motion to dismiss complaint.

3. Opinion-order of the United States District Court dated May 10, 1950, and filed on May 11, 1950, and order and decree dated May 11, 1950, denying the motion of defendant to dismiss the complaint and vacating and setting aside the order of the defendant awarding compensation.

4. The transcript of testimony taken at the hearing before the deputy commissioner on January 31, 1949, together with the exhibits which were copied into said transcript at the end thereof.

5. Notice of appeal.

6. This notice.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ MACKLIN FLEMING,
Assistant U. S. Attorney.
Attorneys for Appellant.

[Endorsed]: Filed August 18, 1950.

[Title of Court of Appeals and Cause.]

**MOTION FOR CONSOLIDATION FOR
BRIEFING AND ARGUMENT**

In the above-entitled causes, appellant hereby moves for the consolidation thereof for purposes of briefing and argument in this court, the grounds for the motion being the existence of a common question of law pertinent to each of these causes, and a common opinion of the District Court covering the common point of law herein.

Dated August 28, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ MACKLIN FLEMING,
Assistant U. S. Attorney.
Attorneys for Appellant.

We join in the above motion.

Dated Aug. 28, 1950.

/s/ JOHN H. BLACK,
/s/ EDWARD R. KAY,
Attorneys for Appellees.

In the United States Court of Appeals for
the Ninth Circuit.

ORDER OF CONSOLIDATION

The above-entitled causes are hereby consolidated
for purposes of briefing and argument in this court.

Dated Aug. 28, 1950.

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ CLIFTON MATHEWS,
Circuit Judge.

/s/ WM. E. ORR,
Circuit Judge.

[Endorsed]: Filed August 30, 1950.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12647

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIR-
TEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S
AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION AND FIREMAN'S
FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

Appeal from the United States District Court for the Northern
District of California, Southern Division

PROCEEDINGS HAD IN THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

Excerpt from Proceedings of Wednesday, February 21, 1951

Before HEALY, BONE and ORR, *Circuit Judges*.

ORDER OF SUBMISSION

Ordered appeals herein argued by Mr. Reynold Colvin, Assistant
United States Attorney, counsel for appellants, and by Mr. Ed Kay,
counsel for appellees, and submitted to the court for consideration
and decision.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

Excerpt from Proceedings of Wednesday, March 14, 1951

Before HEALY, BONE and ORR, *Circuit Judges*.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING
OF JUDGMENTS

ORDERED that the typewritten opinion this day rendered by this
court in above causes be forthwith filed by the clerk, and that a
judgment be filed in each cause and recorded in the minutes of this
court in accordance with the opinion rendered.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT.

No. 12,644

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,645

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,646

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

MATSON TERMINALS, INC., A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,647

Mar. 14, 1951

ALBERT J. CYR, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

Appeals from the United States District Court, Northern District of California, Southern Division

Before HEALY, BONE, and ORR, Circuit Judges.

HEALY, Circuit Judge.

Involved here are consolidated cases, four in number, arising under the Longshoremen's and Harbor Workers' Compensation

Act, 33 USCA §§ 901 et seq. In each case the Deputy Commissioner found a partial disability growing out of injury suffered in the course of employment. In one instance (the Shallat case) the award was for permanent and in the others for temporary disability. On appropriate proceedings before the district court the awards were annulled on the ground that the claims were barred because not filed within one year after the injury as provided in § 13(a) of the Act, 92 F. Supp. 898. The Deputy Commissioner appeals.

In each case the claimant suffered a specific injury from accident on a particular date. No latent injury or occupational disease is involved. There were no voluntary payments of compensation. The claims were filed on dates ranging from 18 to 23 months after the injury. Omitting for the moment what we regard as irrelevant or argumentative matters, the Deputy Commissioner's findings were these:

No. 12,644. Claimant Johnson on May 12, 1947, struck his head on a crossbeam of a vessel while working as a welder, "sustaining extensive strain of the muscles of the neck which still continues painful." His employer continued him in lighter work in a partially disabled condition without reduction in wages until May 15, 1948. He lost no time from work as a result of the injury until about June 15, 1948. Throughout the period in question he was furnished by his employer with medical treatment. His claim for compensation was filed January 17, 1949.

No. 12,645. Claimant Curnutt, on the 18th of February, 1947, while performing services as a sheet-metal worker in ship repair operations sustained personal injury resulting in disability as follows: While lifting a heavy object, he wrenched his back. He was disabled from work for six days, after which he was continued in lighter work at full wages until his employment was terminated January 13, 1948. He did not lose wages in excess of seven days until February 5, 1948. His claim for compensation was filed January 17, 1949. Medical treatment was furnished him by the employer throughout the period.

No. 12,646. Claimant Shallat on November 21, 1947, while performing services as a longshoreman on a vessel sustained personal injury resulting in disability as follows: He caught his left hand between a sling and a bight, causing a contusion of the left hand, and exacerbation of a pre-existing progressive arthritis of the proximal joint of the second or middle finger. Apparently he lost no time because of the injury and continued at work. It does not appear from the findings whether he received medical treatment at the expense of his employer. His claim for compensation was filed May, 23, 1949.

No. 12,647. Claimant Manos on December 22, 1947, while performing services as a welder in the repair of a ship, sustained personal injury resulting in disability when he was struck on top of the head by an iron bar falling from above, suffering strain of the musculature in the cervical region. Following the injury he continued at his regular occupation as a welder without loss of time or wages until January 31, 1949, at which time, because of the condition of his neck, he was forced to discontinue working as a welder and seek other and lighter employment. Throughout the employer furnished him with medical treatment. His claim for compensation was filed August 17, 1949.

The material portion of § 13(a) of the Act reads: "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, except that if payment of compensation has been made without an award on account of such injury . . . a claim may be filed within one year after the date of the last payment . . ."

The Commissioner argues that the word "injury" should be construed as meaning "compensable injury." This, he says, has been the practical administrative construction of the term for a long time. He says that the interpretation is "consistent" with § 19(a), providing that a claim for compensation "may be filed . . . at any time after the first seven days of disability," and with § 6(a) providing that "no compensation shall be allowed for the first seven days of the disability . . ." He adds that unless the interpretation meets with judicial approval his office will be flooded with a load of unnecessary claims.

We may observe in passing that the injured men appear to have suffered a disability of greater or less extent from the outset. Two of them, at least, as the Commissioner found, had to be put on lighter work, and all of them confessedly continued from the time of injury to suffer pain and discomfort from it. It is true they lost no time, or none in excess of seven days anyway, and were paid their old wage, but those facts alone do not spell absence of disability for which an award may be made. See *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 9 Cir., 103 F. 2d 513, where this court sustained an award under like circumstances, saying that wages received by a worker who has suffered an injury are not conclusive and that ability to earn is the test.

But we do not, as the trial court did, rest decision on the *Twin Harbor* holding. What the Commissioner's argument really amounts to is that the statute begins to run, not from the date of the injury, but from the date of disability. The view appears irreconcilable with the plain terms of the Act. The argument necessarily assumes that the terms "injury" and "disability" are interchangeable. However, as we pointed out in *Kobilkin v. Pills-*

bury, 103 F. 2d 667, 669, the terms are separately defined in the statute and are not synonymous. Section 2(2) states that when used in the Act "the term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, . . ." In the same section (subdivision 10) "disability" is defined as meaning "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment."

In the *Kobilkin* case, *supra*, the claimant was disabled from work for a period of three weeks following his injury, for the allowable portion of which time compensation was voluntarily paid him. He then resumed his employment at the former wage and continued to work for 17 months, when his condition worsened and it was learned that his injury was more extensive than had originally been thought. Later he filed a claim. Deputy Commissioner Pillsbury disallowed it because not filed within one year from the last payment of compensation as provided in § 13(a). We upheld the ruling and the Supreme Court affirmed without opinion, 309 U.S. 619.¹ Answering an argument somewhat analogous to the one made here, we said that the injury "was inflicted at the time of the accident, not when its full extent was first noted at the later time."

The Commissioner endeavors to distinguish the holding on the ground that *Kobilkin* was off work for more than seven days in consequence of the injury and was appropriately paid compensation. If the distinction were accepted as of controlling significance a startling result would ensue, as will be seen from the following illustration: Worker A is disabled from work for eight days following his injury, and is accordingly paid compensation for the eighth day. If he fails to file a claim within a year after the payment he is forever barred. Worker B is disabled from work for but six days or less after injury, and in line with § 6(a); *supra*, is paid no compensation. According to the argument there is no time limit within which B may file a claim.

As the language of § 13(a) evidences, Congress was not unaware that there would be many cases like B's and it deliberately provided that the right to compensation in such cases would be-

¹ The *Kobilkin* case, unlike the present, may be thought to have involved a latent or undiscovered injury. It is arguable that in such cases the injury should be treated as arising when its true nature is discovered. Possibly this circumstance accounts for the four to four division among the justices when the case was disposed of in the Supreme Court.

come barred unless claim therefor is filed within one year after the injury. If it is thought desirable in the interest of justice or practical administration that a different limitation be prescribed, the power to effect the change resides in Congress, not in the courts.

The decrees of the district court in the several cases are affirmed.

(Endorsed:) Opinion. Filed Mar. 14, 1951. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12647

WARREN H. PILLSBURY, ETC., APPELLANT

vs.

UNITED ENGINEERING COMPANY, ET AL., APPELLEES

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

(Endorsed:) Filed and entered March 14, 1951. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12647

WARREN H. PILLSBURY, ETC., APPELLANT

vs.

UNITED ENGINEERING COMPANY, ET AL., APPELLEES

Certificate of Clerk, U. S. Court of Appeals for the Ninth Circuit, To Record Certified under Rule 38 of the Revised Rules of the Supreme Court of the United States.

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-one (61) pages, numbered from and including 1 to and including 61 to

be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of Hon. Philip B. Perlman, Solicitor General of the United States, counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit; at the City of San Francisco, in the State of California, this 4th day of June, 1951. [SEAL.]

(S.) PAUL P. O'BRIEN,
Clerk.

In the Supreme Court of the United States

No. — October Term, 1951

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY, ET AL. (HOWARD JOHNSON
INJURY)

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY, ET AL. (FRANK S. CURNETT
INJURY)

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

MATSON TERMINALS, INC., ET AL. (LOUIS SHALLAT INJURY)

ALBERT J. CYR, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY, ET AL. (CHRIS MANOS INJURY)

Upon consideration of the application of counsel for the petitioners,

It is ordered that the time for filing petition for certiorari in the above-entitled causes be, and the same is hereby, extended to and including 11th day of August 1951.

HUGO L. BLACK,
Associate Justice of the Supreme
Court of the United States.

Supreme Court of the United States

No. 229, October Term, 1951

[Title omitted.]

Order allowing certiorari

(Filed October 15, 1951)

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. 229

UNITED STATES COURT, D.C.
FILED

AUG 7 1951

In the Supreme Court of the United States

OCTOBER TERM, 1951

VARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE
THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONG-
SHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT,
PETITIONER

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIRE-
MAN'S FUND INSURANCE COMPANY, A CORPORATION

VARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE
THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONG-
SHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT,
PETITIONER

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIRE-
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VARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE
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FUND INSURANCE COMPANY, A CORPORATION

BERT J. CYR, DEPUTY COMMISSIONER FOR THE THIRTEENTH
COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND
HARBOR WORKERS' COMPENSATION ACT, PETITIONER

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIRE-
MAN'S FUND INSURANCE COMPANY, A CORPORATION

PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No.

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE
THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONG-
SHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT,
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UNITED ENGINEERING COMPANY, A CORPORATION, AND FIRE-
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ALBERT J. CYR, DEPUTY COMMISSIONER FOR THE THIRTEENTH
COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND
HARBOR WORKERS' COMPENSATION ACT, PETITIONER

v.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIRE-
MAN'S FUND INSURANCE COMPANY, A CORPORATION

PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

The Solicitor General, on behalf of Warren H.
Pillsbury and Albert J. Cyr, Deputy Commis-

sioners under the Longshoremen's and Harbor Workers' Compensation Act for the Thirteenth Compensation District, prays that writs of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cases on March 14, 1951.¹

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California, Southern Division (JR. 15; CR. 15; SR. 14; MR. 15) is reported at 92 F. Supp. 898.² The opinion of the United States Court of Appeals for the Ninth Circuit (JR. 44; CR. 70; SR. 42; MR. 56) is reported at 187 F.2d 987.

JURISDICTION

The judgments of the Court of Appeals were entered on March 14, 1951 (JR. 48; CR. 74; SR. 46; MR. 60). By order of Mr. Justice Black dated June 7, 1951, the time for applying for certiorari was extended to and including August 11, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

¹ The Solicitor General appears for petitioners pursuant to the requirements of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901 *et seq.*), as amended by the Act of May 4, 1928, 45 Stat. 490, 33 U.S.C. 921a.

² Because of the existence of a question of law common to each of the four cases, they were consolidated both for trial and on appeal, and all four cases were dealt with in single opinions both in the District Court and the Court of Appeals. For convenience, the records in Nos. 12644, 12645, 12646, and 12647 below are hereinafter respectively referred to as JR, CR, SR, and MR—the letters preceding the letter "R" being the first initial of the surnames of each of the claimants.

QUESTION PRESENTED

Whether the one-year period of limitation upon the filing of claims for compensation for disability under the Longshoremen's and Harbor Workers' Compensation Act, prescribed by Section 13(a) of that Act, begins at the time of the accident, or when the injury resulting from the accident becomes compensable.

STATUTE INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. 901 *et seq.*, are set out in the Appendix, *infra*, pp. 22-25. Section 13(a) of that Act, 33 U.S.C. 913, which is most immediately involved, provides as follows:

The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

STATEMENT

In these four consolidated cases, the plaintiff employers and their respective insurance carriers (respondents herein) seek to set aside and enjoin

the enforcement of Compensation Orders and Awards made by the Deputy Commissioners (petitioners herein) pursuant to the Longshoremen's and Harbor Workers' Compensation Act, *supra*. In each case, respondent's sole contention is that the Deputy Commissioner lacked jurisdiction to make the award because the claim for compensation was not filed within a year after the claimant was accidentally injured. Although this basic question is common to each of the cases, the underlying facts and the Deputy Commissioners' findings differ; accordingly, they are separately stated.

Johnson. Claimant Howard Johnson on May 12, 1947, struck his head and neck on a cross-beam of a vessel while employed as a leaderman welder (JR. 6). Medical treatment was furnished from the date of the accident but no compensation payments were made. (JR. 4, 6, 7). Although suffering extensive strain of the neck muscles, Johnson lost no time from work as a result of the accident—his employer continuing him without reduction in wages as a welder at lighter work in its machine shop until it disposed of its business on May 15, 1948 (JR. 6, 28-29). Subsequently, on June 15, 1948, Johnson was discharged by the new owner because of his physical inability to do welding aboard ship (JR. 29, 31). Since that time, Johnson has been employed only intermittently at jobs requiring only the less strenuous types of welding operations (JR. 6, 29, 30). On January 17, 1949, twenty-one months after the date of the accident,

Johnson filed his claim for compensation. At the time of the hearing, Johnson had just obtained new employment as a shop welder at a slightly lower rate of pay (JR. 30). The Deputy Commissioner found that no cause of action accrued in Johnson's favor under the Act until the completion of one week's disability from labor after June 15, 1948,³ and that the claim for compensation was, therefore, not barred by limitations (JR. 6).

Curnutt. Claimant Frank S. Curnutt on February 18, 1947, while employed as a sheetmetal worker aboard a vessel, wrenched his back in lifting a heavy object from the deck to a table (CR. 6, 33). Medical treatment was furnished him, but no compensation payments were made (CR. 4, 6, 7). He was disabled from work for six days (CR. 6). When he returned to his job, he was relieved of all heavy work on doctor's orders (CR. 34), and performed lighter duties at his former wage rate until his employment was terminated on January 13, 1948 (CR. 6, 34, 44). After resting for two weeks to improve his condition, he obtained work with another company (CR. 35, 50). In June 1948, he took a vacation for five weeks as a therapeutic measure suggested by his physicians (CR. 7, 35, 51). In July, he returned to work with still another company, but soon was forced to give up this job, and subsequent ones, because the work

³ Section 6 of the Act provides that no compensation shall be allowed for the first seven days of the disability. 33 U.S.C. 906.

was too strenuous (CR. 35, 36, 45). On January 17, 1949, twenty-three months after the date of the accident, Curnutt filed his claim for compensation (CR. 6). At the time of the hearing, Curnutt had just obtained new employment as a sheetmetal worker (CR. 46). The Deputy Commissioner found that Curnutt had not lost wages in excess of seven days as a result of his injury until February 5, 1948, and that the claim for compensation was, therefore, not barred by limitations (CR. 6).

Shallat. Claimant Louis Shallat on November 21, 1947, caught his left hand between a sling and a bight while working as a stevedore aboard a vessel (SR. 5). He sustained a contusion of the left hand and exacerbation of a pre-existing progressive arthritis of the proximal joint of the second or middle finger (SR. 6). Shallat apparently lost no time because of the accident and continued at work. No compensation payments were made (SR. 4, 6). According to his testimony, his hand pained him considerably and he applied self-treatment (SR. 29). The pain progressively became more severe, and he filed a claim for compensation on May 23, 1949, eighteen months after the accident (SR. 6, 28). Upon these facts, the Deputy Commissioner found that Shallat had not sustained a disability for which an award could be made "until the condition of his left second finger reached a permanent stage and became a permanent disability" (SR. 6), which was "within one year prior to the filing of the claim" (SR. 6). He held, there-

fore, that the claim was not barred by limitations (SR. 6).

Manos. Claimant Chris Manos on December 22, 1947, while employed as a welder aboard a vessel, was struck on the top of his head by an iron saddle falling from above and sustained a strain of the musculature in the cervical region (MR. 6, 26). He was instructed not to weld by his physician, and, consequently, was given lighter work by his employer at the same rate of pay (MR. 6, 27-28). Medical treatment was furnished him, but no compensation payments were made (MR. 4, 7). A few months later, his job was terminated as a result of a general reduction in employment at the shipyard (MR. 28). After a week, he obtained another job as a shop welder at a slightly higher wage rate (MR. 29). This job ended in January, 1949, because of a general lay off (MR. 29, 30). His neck troubled him continually since the accident, and his injury progressively became worse despite medical treatment (MR. 27, 30, 31, 35, 36, 37). On August 17, 1949, twenty months after the date of the accident, he filed his claim for compensation (MR. 7). At the time of the hearing, Manos was still unemployed, but was planning to engage in sales work (MR. 30). Upon these facts, the Deputy Commissioner found that he was forced to discontinue working as a welder and seek lighter employment because of the condition of his neck on or about January 31, 1949; that he first became disabled and suffered wage loss beginning with February 1, 1949,

within one year prior to the filing of the claim; and that the claim was not, therefore, barred by limitations (MR. 7).

In the proceedings before the district court, the Deputy Commissioners justified their awards as supported by the evidence and in accordance with the law, and moved to dismiss the complaints on the ground that Section 13(a) of the Act starts the one-year period of limitation running, not from the date of the injury, but from the date on which the injury becomes compensable (JR. 12, 18; CR. 12, 18; SR. 11, 17; MR. 12, 18). Without deciding this question, the court held that the Deputy Commissioners had erred in finding that the injuries were not compensable prior to a loss of wages. The court pointed out that compensation is payable under the Act for disability, which is defined in Section 2(10) as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment" (33 U.S.C. 902(10)), and found, after making its own appraisal of the evidence, that the claimants' earning capacity had been impaired from the dates of injury so as to have entitled them to compensation.⁴ It held that the claims for com-

⁴ The Deputy Commissioners had made no express findings in respect of the claimants' earning capacity other than the findings as to when loss of wages occurred. They found, however, that no compensation had been paid, which would seem to imply that, in their view of the several cases, the claimants had earned the full amount of the wages paid to them. Had the Deputy Commissioners adopted the view of the case later taken by the District Court, the continued

pensation, not having been made within one year of the injuries, had not been timely filed and accordingly set aside and vacated the awards (JR. 15-21; CR. 15-21; SR. 14-20; MR. 15-21).

On appeal, the court below affirmed but rested its decision upon a different ground. On the basis of its prior decision in *Kobilkin v. Pillsbury*, 103 F. 2d 667, affirmed by an equally divided Court, 309 U.S. 619, 695, it held that the period of limitation begins to run from the date of the accident, and not from the date of disability or compensable injury (JR. 44-48; CR. 70-74; SR. 42-46; MR. 56-60).

REASONS FOR GRANTING THE WRIT

In *Kobilkin v. Pillsbury*, 103 F. 2d 667, the court below held, in apparent conflict with the earlier decision of the Court of Appeals for the Third Circuit in *Di Giorgio Fruit Corp. v. Norton*, 93 F. 2d 119, certiorari denied, 302 U.S. 767, that the period of limitation prescribed by Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act, *supra*, begins at the time of the accident. Subsequent to this Court's grant of certiorari (308 U.S. 530), and prior to the date of argument in the *Kobilkin* case, the Court of Appeals for the District of Columbia Circuit widened the area of conflict by holding, in accord with the Court of Ap-

payment of full wages might have been regarded as constituting in part a payment of compensation without an award, thereby bringing the cases within the exception extending the one-year limitation where voluntary payments are made. See p. 19, *infra*.

peals for the Third Circuit, that the period of limitation does not begin until the injury becomes compensable. *Potomac Electric Power Co. v. Cardillo*, 107 F. 2d 962. The conflict of decisions among the circuits thus presented was left unresolved by this Court's later affirmance, without opinion and by an equally divided Court, of the *Kobilkin* decision. 309 U.S. 619, rehearing denied, 309 U.S. 695. The Court of Appeals for the District of Columbia Circuit has since reaffirmed its prior interpretation of Section 13(a), *Great American Indemnity Co. v. Britton*, 179 F. 2d 60, and, as a result of the decision below in the instant case, the conflict remains unresolved. Since the interpretation of the period of limitation prescribed under the Longshoremen's and Harbor Workers' Compensation Act and related Acts is a question of substantial importance in the administration of these statutes, we again respectfully ask this Court for an authoritative ruling.⁵

1. Construed as a whole, the language and structure of the Act compel rejection of the interpretation given Section 13(a) by the court below.

(a) In holding that the period of limitations begins from the time of accident instead of from the time the injury becomes compensable, the court below held, in effect, that it begins to run before the

⁵ Because of the conflict of decisions and the substantial importance of the question presented, the Solicitor General, on behalf of the respondent Pillsbury, joined the petitioner in the application for a writ of certiorari in the *Kobilkin* case.

cause of action accrues. The Act does not give an employee any right to compensation if he is merely the victim of an accident; nor is mere pain and suffering compensable. Nor does the Act give him any right to compensation (other than the medical services and supplies provided for in Section 7 (33 U.S.C. 907))⁶ even if he sustains an injury. Under Section 3(a) (33 U.S.C. 903(a)), compensation is payable only "in respect of disability or death"—disability being defined in Section 2(10) (33 U.S.C. 902(10)) as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Compensation for disability, furthermore, is payable only if the disability lasts more than seven days. Section 6 (33 U.S.C. 906) provides that "no compensation shall be allowed for the first seven days of the disability," and Section 19(a) (33 U.S.C. 919(a)) does not permit the filing of a claim for compensation until "any time after the first seven days of disability following any injury."

The statutory scheme, accordingly, is as follows: The employee (or his representative) can recover compensation only if the employee is killed, or rendered temporarily or permanently incapable of earning his customary wages; the death or disability must be the result of an injury. The occurrence of an accident (a term not used in the statute) gives no right to compensation, nor does the sus-

⁶ Such medical benefits are not "compensation" under the Act. *Marshall v. Pletz*, 317 U.S. 383.

taining of an injury; disability or death must result before the employee (or his representative) can claim compensation.

Since an employee can not file a claim until he has been disabled (for more than seven days), it would seem to follow as a matter of course that the period of limitation prescribed in Section 13(a) does not start until the employee is "disabled." In other words, "injury" in Section 13(a) should be construed, as was done in the *Di Giorgio* and *Potomac Electric Power Co.* cases, *supra*, to mean "compensable injury." The contrary reading, adopted by the court below, would cause the period of limitation to run before the employee becomes entitled to file a claim at all. Construing the word "injury" to mean "accident" would, in the case of a disability delayed for more than a year after the accident, compel the employee to seek compensation before he could claim it, and bar his claim when he becomes entitled to it. But "an intent to bar compensation claims before they arise cannot fairly be imputed to Congress." *Potomac Electric Power Co. v. Cardillo*, *supra*, at 964. "It cannot be that the statute of limitations will be allowed to commence to run against a right until that right has accrued in a shape to be effectually enforced." *Borer v. Chapman*, 119 U.S. 587, 602; cf. *Urie v. Thompson*, 337 U.S. 163, 170. So to read the statute is, we submit, to disregard the oft-repeated injunction that the Longshoremen's Act should be

liberally construed to avoid incongruous or harsh results. See *Baltimore & Phila. Steamboat Co. v. Norton*, 284 U.S. 408, 414; *Harbor Marine Contracting Co. v. Lowe*, 152 F. 2d 845, 847 (C.A. 2), certiorari denied, 328 U.S. 837; *Travelers Ins. Co. v. Branham*, 136 F. 2d 873, 875 (C.A. 4).

(b) To construe "injury" in Section 13(a) as meaning "compensable injury" not only brings that section into harmony with the other provisions of the Act but avoids incongruity within that section as well. Section 2(2) (33 U.S.C. 902(2)) defines "injury" as (1) "accidental injury," or (2) "death" which arises "out of and in the course of employment," and (3) "occupational disease or infection * * * as naturally or unavoidably results from such accidental injury." Section 13(a) provides that a claim for compensation must be filed "within one year after the injury" and "within one year after the death." Accordingly, to read "injury" in Section 13(a) as meaning "accident" is to ignore the fact that the definition of "injury" includes "death" and that the period of limitation upon a claim for death expressly does not begin at the time of the accident, but only when the accident has culminated in death. Cf. *Lawson v. Suwannee S. S. Co.*, 336 U.S. 198. Obviously, death is not always or even generally concurrent with the accident; it frequently occurs at some later time. Further, as noted above, "injury" includes within its definition occupational disease or infec-

tion resulting from accidental injury. Implicitly, therefore, where occupational disease or infection results from accidental injury, "injury" can not be defined as "accident" without barring claims for occupational disease which develops more than a year after the accident. Consequently, it would seem to follow that, where an accident results in "accidental injury" the "injury" within the statutory meaning does not occur at the time of the accident, but, as in the case of death or occupational disease, only when the resulting disability arises. This conclusion is substantiated by the textual definition of "injury" in Section 2(2) as "accidental injury." "Accidental injury" can mean only one thing—injury resulting from an accident. It is clear, therefore, that the Act intended to distinguish between "accident" and "injury" and not to equate them. To read "injury" otherwise where trauma are concerned would be to accord an inconsistent treatment within Section 13(a) to the three statutory kinds of "injury"—trauma, death, and occupational disease. On the other hand, to read "injury" as "compensable injury" is entirely in accord with the Act's humanitarian purpose and spirit.⁷

⁷ The opinion below suggests that, had Congress intended the period of limitation to begin when an employee is disabled and, therefore, entitled to compensation, Congress would have employed the phrase "compensable injury" or "disability" rather than "injury" in Section 13(a) of the Act. It can equally be argued that, had Congress intended the period to begin at the time of the "accident," it would have employed that word rather than "injury." We think it not without

2. In *Kobilkin v. Pillsbury*, 103 F. 2d 667, *supra*, the court below relied in great part upon its reading of local law decisions, stating that "decisions arising under statutory provisions analogous to those of the federal act generally hold that the date of injury, and not the subsequent date when incapacity develops, is the one from which the time lim-

significance that Congress deliberately employed the word "injury." As originally introduced, the bill which became the Longshoremen's Act (S. 3170, 69th Cong., 1st Sess.; 67 Cong. Rec. 4119) provided, in Section 14 thereof, that "the right to claim compensation shall be barred unless within two years after the accident * * * a claim for compensation shall be filed with the deputy commissioner * * *." Comparison of this provision of the bill with the language ultimately embodied in Section 13(a) of the Act reveals that Congress reduced the statutory period from two years to one year, and also substituted the word "injury" for the word "accident." This change is illuminating in view of the fact that the Longshoremen's Act is modeled upon the New York Workmen's Compensation Law (H. Rep. 1422, 70th Cong., 1st Sess.; *Wheeling Corrugating Co. v. McManigal*, 41 F. 2d 593, 595 (C.A. 4); *Kropp v. Parker*, 8 F. Supp. 290, 293 (D. Md.)), which as enacted in 1914 used the word "injury" in its limitation section but was amended in 1918 to substitute the word "accident" for "injury." That the adoption of the word "injury" instead of the word "accident" in the Longshoremen's Act was purposive is evidenced by the treatment the state courts have accorded amendments to local compensation laws which substituted "accident" for "injury." See *Landauer v. State Industrial Acc. Commission*, 175 Ore. 418, 154 P. 2d 189, and cases there collected. In this connection, it should be observed that the word "injury" might possibly be construed as "accident" in other sections of the Act. Cf. *Bethlehem Steel Co. v. Parker*, 163 F. 2d 334 (C.A. 4). But there is no need to decide those questions in the instant case; the word "injury," wherever it occurs in the Act, should be construed in the light of the context, structure, and purposes of the Act, and its meaning in different places need not be the same if the context, structure and purposes indicate otherwise. Cf. *Lawson v. Suwannee S. S. Co.*, 336 U.S. 198; *United States v. Champlin Refining Co.*, 341 U.S. 290; compare *Hustus' Case*, 123 Me. 428, 123 Atl. 514, with *McKenna's Case*, 117 Me. 179, 103 Atl. 69.

itation must be reckoned." (103 F.2d at 669-670). To the extent that the disposition of the instant case by the court below upon the authority of the *Kobilkin* case reaffirms this ground for decision, it perpetuates a fundamental error which lends no support to the decision below.

Cases in the state courts construing state compensation acts are, of course, not controlling in interpreting the Longshoremen's Act. The limitation provisions of the various state acts differ extensively, some use the word "injury" as does the Longshoremen's Act, some use "accident," some have special governing definitions, and some have entirely different provisions. But where state statutes employ language substantially similar to that of the Longshoremen's Act, the clear weight of opinion, as the Courts of Appeals for the Third and District of Columbia Circuits pointed out in the *Di Giorgio* and *Potomac Electric Power Co.* cases, *supra*, is that "injury" should be construed to mean "compensable injury." See *Donaldson v. Calvert McBride Printing Co.*, 232 S.W. 2d 651 (Ark.); *Marsh v. Industrial Accident Comm'n*, 217 Cal. 338, 18 P. 2d 933; *Esposito v. Marlin-Rockwell Corp.*, 96 Conn. 414, 114 Atl. 92; *Burke v. Industrial Accident Comm'n*, 368 Ill. 554, 15 N.E. 2d 305; *Farmers Mutual Liability Co. v. Chaplin*, 114 Ind. App. 372, 51 N.E. 2d 378; *Guderian v. Sterling Sugar & Ry. Co.*, 151 La. 59, 91 So. 546; *Hustus' Case*, 123 Me. 428, 123 Atl. 514; *Clouser v.*

Minnesota Steel Co., 186 Minn. 80, 242 N.W. 397; *Wheeler v. Missouri Pac. R. Co.*, 328 Mo. 888, 42 S.W. 2d 579; *Anderson v. Contract Trucking Co.*, 48 N.M. 158, 146 P. 2d 873; *Swift & Co. v. State Industrial Comm'n*, 161 Okla. 132, 17 P. 2d 435; *Acme Body Works v. Koepsel*, 204 Wisc. 493, 234 N.W. 756, 236 N.W. 378; *Baldwin v. Scullion*, 50 Wyo. 508, 62 P. 2d 531; see also Br. for Resp. Pillsbury, in *Kobitkin v. Pillsbury*, No. 204, Oct. Term 1939, pp. 32-33; Appendix C, pp. 54-62.

3. The district court held that an employee is disabled within the meaning of the Act, and thus entitled to compensation, when he has become incapable of earning his customary wages rather than when the employee has suffered an actual loss of wages. The district court then found that the claimants' earning capacity had been impaired from the dates of injury so as to have entitled them to compensation, and that full wages were paid them not because they had earned them, but because of "exceptional consideration from a sympathetic employer" (JR. 19; CR. 19; SR, 18; MR. 19). If the court's interpretation of the Act is correct (see *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 F. 2d 513 (C.A. 9)), it fell into reversible error in several respects. First, it should have remanded the several cases to the Deputy Commissioners to make findings as to when the claimants became incapable of earning their customary wages, rather than reappraising the evi-

dence itself and making its own independent findings on this point. See *Cardillo v. Liberty Mutual Ins. Co.*, 330 U. S. 469; *O'Leary v. Brown-Pacific-Maxon*, 340 U. S. 504. Secondly, even if it be assumed that an injury becomes compensable as soon as the employee's general earning capacity is impaired, notwithstanding that his employer continues to pay him the same wages, it does not follow that the period of limitations begins to run at that time, in the absence of proof that the employee knew or had reason to know that he had a right to file a claim for compensation because of such impairment. Section 8(h) provides that in case of a partial disability, like those involved here, the "wage-earning capacity of an injured employee * * * shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity * * *." Only the Deputy Commissioner, and not the injured employee, can make a finding whether the actual wages paid are fairly and reasonably representative of wage-earning capacity. Accordingly, an employee could reasonably and in good faith rely upon the language of Section 8(h) in believing that his wage-earning capacity is not impaired unless and until his wages are actually reduced. As a practical matter, the only way in which an employee in a situation like this would normally know that his "wage-earning capacity" had been

impaired even though his wages remained the same would be if the employer were explicitly to advise him to that effect. In none of the present cases did the employer either allege or offer to prove that the injured employee knew or had reason to know that his "earning capacity" was less than the wages he was actually receiving, and that consequently he was entitled to file a claim for compensation. In these circumstances, it was error to hold, as the district court did, that the employees were barred by the one-year period of limitations. Cf. *Great American Indemnity Co. v. Britton*, 179 F. 2d 60 (C. A. D. C.).

Finally, even if, in fact, the claimants' earning capacity had been impaired from the dates of injury so as to have entitled them to compensation, the cases should have been remanded to the Deputy Commissioners for findings as to whether or not in these particular cases the full wages paid to the claimants constituted, in part, gratuities or voluntary payments of compensation which would fall within the exception of Section 13(a) that "if payment of compensation has been made without an award * * * a claim may be filed within one year after the date of the last payment."

The court below upheld the district court's judgments but did not review the grounds on which the district court decided the cases (JR. 46; CR. 72; SR. 44; MR. 58). To the extent that respondents may rely upon the district court's holding as

an independent ground for affirmance, we respectfully submit that for the above-stated reasons it was erroneous.

4. The question here presented is one of substantial importance in the administration of the Longshoremen's Act.⁸ If the time for filing claims begins, as the court below held, from the accident rather than the injury, it will be necessary for each employee who meets with an accident whether or not he suffers injury, or disability, or loss of pay, to file a claim for compensation as a matter of self-protection although he may be fully cognizant that he had no right to receive compensation and that his claim must be rejected. This interpretation of the Act will not be readily understood by those whom the Act seeks to protect, and thus operate to their detriment. In particular, a disabled workman who has been paid full wages regularly will not readily regard himself as entitled to compensation in addition to full wages. And an unscrupulous employer may lull an employee into allowing the short limitations period to run by paying full wages for a year and then dismissing him. Cf. *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 F. 2d 513, 516 (C.A. 9)..

The interpretation of the court below is also one which would impair effective administration.

⁸ The provisions of the Act have been extended to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600, and to other areas by the Defense Bases Act of August 16, 1941, 55 Stat. 622, 42 U.S.C. 1651.

Thus, in the San Francisco Compensation District (under the Longshoremen's Act) alone, some 27,000 injuries were reported under the Act in 1946 (the last year in which detailed figures were reported) or 74 for each calendar day, in which the disability was 7 days or less. If claims must be filed in all such cases to avoid the period of limitations, it would be necessary for the Deputy Commissioner, pursuant to the requirements of Section 19 of the Act (33 U.S.C. 919), upon receipt of each claim, to give notice thereof to the employer and compensation carrier, to investigate, to hold hearings and to adjudicate each claim. It is doubtful that the Deputy Commissioner could perform these statutory functions and do justice to the claims actually compensable under the Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for writs of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST, 1951.

APPENDIX

The relevant provisions of the Longshoremen's and Harbor Workers' Compensation Act. (c. 509, 44 Stat. 1424, 33 U. S. C., Secs. 901 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * *

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(11) "Death" as a basis for a right to compensation means only death resulting from an injury.

(12) "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this Act, and includes funeral benefits provided therein.

* * * * *

SEC. 3. (a) Compensation shall be payable under this Act in respect of disability or death

of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

* * * * *

SEC. 4. (b) Compensation shall be payable irrespective of fault as a cause for the injury.

* * * * *

SEC. 6. (a) No compensation shall be allowed for the first seven days of the disability, except the benefits provide for in section 7: *Provided, however,* That in case the injury results in disability of more than forty-nine days, the compensation shall be allowed from the date of the disability.

* * * * *

SEC. 7. (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require. * * *

* * * * *

SEC. 13. (a) The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except

that if payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

* * * * *

SEC. 19. (a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Administrator at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

* * * * *

SEC. 21. (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in

the Federal district court for the judicial district in which the injury occurred (or in the district court of the United States for the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

* * * * *

(d) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 18.

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SUPREME COURT, U.S.

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No. 229

In the Supreme Court of the United States

OCTOBER TERM, 1951

WILLIAM H. PLEASANT AND ALBERT J. CYR, DEPUTY
COMMISSIONERS FOR THE TWENTY-SEVENTH COMPENSA-
TION DISTRICT, UNDER THE LONGSHOREMEN'S AND
HARBOR WORKERS' COMPENSATION ACT, ET AL.,
PETITIONERS

UNITED ENGINEERING COMPANY, A CORPORATION,
FIREMEN'S FUND INSURANCE COMPANY, A CORPO-
RATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

SEINF FOR PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1951

7

No. 229

WARREN H. PILLSBURY AND ALBERT J. CYR, DEPUTY
COMMISSIONERS FOR THE THIRTEENTH COMPENSA-
TION DISTRICT, UNDER THE LONGSHOREMEN'S AND
HARBOR WORKERS' COMPENSATION ACT, ET AL.,
PETITIONERS

v. D

UNITED ENGINEERING COMPANY, A CORPORATION,
FIREMEN'S FUND INSURANCE COMPANY, A CORPO-
RATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States District Court
for the Northern District of California, Southern
Division (JR. 15; CR. 15; SR. 14; MR. 15) is re-
ported at 92 F. Supp. 898.¹ The opinion of the

¹ Because of the existence of a question of law common to
each of the four cases, they were consolidated both for trial
and on appeal, and all four cases were dealt with in single

2

United States Court of Appeals for the Ninth Circuit (JR. 44; CR. 70; SR. 42; MR. 56) is reported at 187 F. 2d 987.

JURISDICTION

The judgments of the Court of Appeals were entered on March 14, 1951 (JR. 48; CR. 74; SR. 46; MR. 60). By order of Mr. Justice Black, dated June 7, 1951, the time for applying for certiorari was extended to and including August 11, 1951. The petition for a writ of certiorari was filed on August 7, 1951, and was granted on October 15, 1951. (JR. 53; CR. 79; SR. 51; MR. 65). The jurisdiction of this Court rests upon 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the one-year period of limitation upon the filing of claims for compensation for disability under the Longshoremen's and Harbor Workers' Compensation Act, prescribed by Section 13(a) of that Act, begins at the time of the accident, or only when a compensable injury accrues.

STATUTE INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901 *et seq.*, are set out in the Appendix, *infra*, pp. 56-61. Section 13(a)

opinions both in the District Court and the Court of Appeals. For convenience, the records in Nos. 12644, 12645, 12646, and 12647 below are hereinafter respectively referred to as JR, CR, SR, and MR—the letters preceding the letter “R” being the first initial of the surnames of each of the claimants.

of that Act, 33 U.S.C. 913, which is most immediately involved, provides as follows:

The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

STATEMENT

In these four consolidated cases, the plaintiff employers and their respective insurance carriers (respondents herein) seek to set aside and enjoin the enforcement of Compensation Orders and Awards made by the Deputy Commissioners (petitioners herein) pursuant to the Longshoremen's and Harbor Workers' Compensation Act, *supra*. In each case, respondents' sole contention is that the Deputy Commissioner lacked jurisdiction to make the award because the claim for compensation was not filed within a year after the accident in which the claimant was physically injured. Although this basic question is common to each of the cases, the underlying facts and the Deputy Com-

missioners' findings differ; accordingly, they are separately stated.

Johnson. Claimant Howard Johnson, on May 12, 1947, struck his head and neck on a cross-beam of a vessel while employed as a leaderman welder (JR. 6). Medical treatment was furnished from the date of the accident but no compensation payments were made (JR. 4, 6, 7). Although suffering extensive strain of the neck muscles, Johnson lost no time from work as a result of the accident—his employer continuing him without reduction in wages as a welder at lighter work in its machine shop until it disposed of its business on May 15, 1948 (JR. 6, 28-29). Subsequently on June 15, 1948, Johnson was discharged by the new owner because of his physical inability to do welding aboard ship (JR. 29, 31). Since that time, Johnson has been employed only intermittently at jobs requiring only the less strenuous types of welding operations (JR. 6, 29, 30). On January 17, 1949, twenty-one months after the date of the accident, Johnson filed his claim for compensation. At the time of the hearing, Johnson had just obtained new employment as a shop welder at a slightly lower rate of pay (JR. 30). The Deputy Commissioner found that no cause of action accrued in Johnson's favor under the Act until the completion of one week's disability from labor after June 15, 1948,²

²Section 6 of the Act provides that no compensation shall be allowed for the first seven days of the disability. 33 U.S.C. 906.

and that the claim for compensation was, therefore, not barred by limitations (JR. 6).

Curnutt. Claimant Frank S. Curnutt, on February 18, 1947, while employed as a sheetmetal worker aboard a vessel, wrenched his back in lifting a heavy object from the deck to a table (CR. 6, 33). Medical treatment was furnished him, but no compensation payments were made (CR. 4, 6, 7). He was disabled from work for six days (CR. 6). When he returned to his job, he was relieved of all heavy work on doctor's orders (CR. 34), and performed lighter duties at his former wage rate until his employment was terminated on January 18, 1948 (CR. 6, 34, 44). After resting for two weeks to improve his condition, he obtained work with another company (CR. 35, 50). In June, 1948, he took a vacation for five weeks as a therapeutic measure suggested by his physicians (CR. 7, 35, 51). In July, 1948, he returned to work with still another company, but soon was forced to give up this job, and subsequent ones, because the work was too strenuous (CR. 35, 36, 45). On January 17, 1949, twenty-three months after the date of the accident, Curnutt filed his claim for compensation (CR. 6). At the time of the hearing, Curnutt had just obtained new employment as a sheetmetal worker (CR. 46). The Deputy Commissioner found that Curnutt had not lost wages in excess of seven days as a result of his physical injury until February 5, 1948, and that the claim for compensa-

tion was, therefore, not barred by limitations (CR. 6).

Shallat. Claimant Louis Shallat, on November 21, 1947, caught his left hand between a sling and a bight while working as a stevedore aboard a vessel (SR. 6). He sustained a contusion of the left hand and exacerbation of a pre-existing progressive arthritis of the proximal joint of the second or middle finger (SR. 6). Shallat apparently lost no time because of the accident and continued to work. No compensation payments were made (SR. 4, 6). According to his testimony, his hand pained him considerably and he applied self-treatment (SR. 29). The pain progressively became more severe, and he filed a claim for compensation on May 23, 1949, eighteen months after the accident (SR. 6, 28). Upon these facts, the Deputy Commissioner found that Shallat had not sustained a disability for which an award could be made "until the condition of his left second finger reached a permanent stage and became a permanent disability" (SR. 6), which was "within one year prior to the filing of the claim" (SR. 6). He held, therefore, that the claim was not barred by limitations (SR. 6).

Manos. Claimant Chris Manos, on December 22, 1947, while employed as a welder aboard a vessel, was struck on the top of his head by an iron saddle falling from above and sustained a strain of the musculature in the cervical region (MR. 6, 26). He was instructed not to weld by his physician,

and, consequently, was given lighter work by his employer at the same rate of pay (MR. 6, 27-28). Medical treatment was furnished him, but no compensation payments were made (MR. 4, 7). A few months later, his job was terminated as a result of a general reduction in employment at the shipyard (MR. 28). After a week, he obtained another job as a shop welder at a slightly higher wage rate (MR. 29). This job ended in January 1949, because of a general lay off (MR. 29, 30). His neck troubled him continually since the accident, and his injury progressively became worse despite medical treatment (MR. 27, 30, 31, 35, 36, 37). On August 17, 1949, twenty months after the date of the accident, he filed his claim for compensation (MR. 7). At the time of the hearing, Manos was still unemployed, but was planning to engage in sales work (MR. 30). Upon these facts, the Deputy Commissioner found that he was forced to discontinue working as a welder and seek lighter employment because of the condition of his neck on or about January 31, 1949; that he first became disabled and suffered wage loss beginning with February 1, 1949, within one year prior to the filing of the claim; and that the claim was not, therefore, barred by limitations (MR. 7).

In the proceedings before the district court, the Deputy Commissioners justified their awards as supported by the evidence and in accordance with the law, and moved to dismiss the complaints on the ground that Section 13(a) of the Act starts the

one-year period of limitation running, not from the date of accidental physical injury, but from the date on which a legal injury becomes compensable (JR. 12, 18; CR. 12, 18; SR. 11, 17; MR. 12, 18). Without deciding this question, the district court held that the Deputy Commissioners had erred in finding that the injuries were not compensable prior to actual loss of wages. The court pointed out that compensation is payable under the Act for disability, which is defined in Section 2(10) as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment" (33 U.S.C. 902(10)), and found, after making its own independent reappraisal of the evidence, that the claimants' earning capacity had been impaired from the dates of their physical injuries so as to have entitled them at that time to compensation in addition to full wages. It held that the claims for compensation, not having been made within one year of the physical injuries, had not been timely filed and accordingly set aside and vacated the awards (JR. 15-21; CR. 15-21; SR. 14-20; MR. 15-21).

On appeal, the court below affirmed, but rested its decision upon a different ground. On the basis of its prior decision in *Kobilkin v. Pillsbury*, 103 F. 2d 667, affirmed by an equally divided Court, 309 U.S. 619, 695, it held that the period of limitation begins to run from the date of the accident, and not from the date of disability or accrual of a

compensable injury (JR. 44-48; CR. 70-74; SR. 42-46; MR. 56-60).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the limitation provision of Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act requires the filing of a claim for compensation within one year after the accident rather than within one year after a compensable injury accrues.

2. In holding that the instant claims for compensation were barred by the limitation provision of Section 13(a).

3. In affirming the decrees of the district court which set aside and vacated the awards of compensation made by the Deputy Commissioners.

SUMMARY OF ARGUMENT

I

A. Respondent's case is primarily founded on the proposition that, by reason of its statutory definition in Section 2(2), the word "injury" has a clear and unambiguous meaning throughout the Longshoremen's and Harbor Workers' Compensation Act—i.e., "accident" or "physical injury"—which must be applied mechanically to Section 13(a). But if we carry over that definition (in the way respondent reads it) mechanically into Section 13(a), we create obvious incongruities in the language, and vitiate the Act's humanitarian purposes. We submit, rather, that the meaning of

"injury" in Section 13(a) should be determined in light of the language and structure of the Act as a whole, the Act's humanitarian purposes, its accepted standard of liberal construction, and its legislative history. Cf. *Lawson v. Suwannee S.S. Co.*, 336 U.S. 198.

B. In holding that the period of limitation in Section 13(a) runs from the time of the accident or physical injury instead of from the time a compensable, or legal, injury accrues, the Court of Appeals has held, in effect, that it begins to run before the cause of action accrues. Construed as a whole, the language and structure of the Act compel rejection of this interpretation. An employee has no right to compensation under the Act if he is merely the victim of an accident; nor has he any right to compensation if he sustains physical injury and pain and suffering. Under Section 3(a), compensation is payable only "in respect of disability or death"—disability being defined in Section 2(19) as "incapacity * * * to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Since an employee has no claim for compensation for "disability" until he has been disabled, it follows that the period of limitation upon that claim should not start until his injury has become compensable and he is disabled. So construed, the term "injury" is given a meaning which is consistent with its textual definition in Section 2(2) and which harmonizes the several

limitation provisions of Section 13(a). On the other hand, to read "injury" as meaning "accident" would, in the case of a disability delayed for more than a year after the accident or physical injury, compel the employee to seek compensation before he could properly claim it and bar his claim when he becomes entitled to it.

C. The construction adopted by the court below not only lacks support in the language of the Act but is also opposed to well-established principles of construction of statutes of limitations. For it has long been settled that a statute of limitations will not be allowed to run against a right until that right has accrued in a shape to be effectually enforced. Unlike tort actions based on negligence, pecuniary loss to the employee, rather than a wrongful act on the part of the employer, is the essential element in the employee's claim under workmen's compensation statutes. Since no cause of action accrues prior to such pecuniary loss, the period of limitation should begin to run not at the time of physical injury but only after economic, or compensable, injury has been sustained.

D. Although examination of the legislative history of the Act reveals no discussion of the problems involved in this case, a related phase of that history supports the view that "injury" should not be construed to mean "accident" or "physical injury." As originally introduced, the bill which later became the Longshoremen's Act provided for a period of limitation running from the time of

"accident"; as enacted, the word "injury" was substituted for "accident." Despite the absence of Congressional comment upon the reasons for the change, it seems reasonably clear that the change would not have been made unless Congress intended that "injury" should have a meaning different from that of "accident."

E. Cases in the state courts construing state compensation acts are, of course, not controlling in interpreting the Longshoremen's Act since the limitation provisions of the various state acts differ extensively. But where state statutes employ language substantially similar to that of the Longshoremen's Act, the clear weight of authority is that "injury" means "compensable injury."

II

Having shown that "injury" in Section 13(a) should be read as "compensable injury," there remains the further question of when the injuries herein became compensable. Under the Act, a physical injury other than a schedule loss becomes compensable when the employee suffers a loss of wage-earning capacity. Where the accident results in a physical injury which is a schedule loss (i.e., the loss of, or the loss of the use of, a leg, arm, hand, eye, etc.), the injury becomes compensable as soon as the schedule loss is sustained. In three of the cases at bar (Johnson, Curnutt, and Manos), no schedule losses were incurred. Their injuries, therefore, became compensable when

their wage-earning capacity was impaired. In the fourth case (Shallat), a schedule loss was involved. His injury, therefore, became compensable when he sustained the schedule loss.

In each of the cases, the claimants were physically injured on the dates of their accidents, more than one year prior to the filing of their claims. However, their claims were filed, according to the findings of the Deputy Commissioners, within one year after they had suffered loss of wage-earning capacity or a schedule loss, and were, therefore, timely. We submit that examination of the record fully substantiates these findings.

ARGUMENT

Section 3(a) of the Longshoremen's and Harbor Workers' Compensation Act³ grants to covered employees the right to workmen's compensation for "disability or death" resulting from "injury." "Disability" is defined in Section 2(10) as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." And "injury" is defined in Section 2(2), in pertinent part, as "accidental injury or death arising out of and in the course of employment." "The right to compensation for disability," however, is barred "unless a claim therefor is filed within one year after the injury." (Section 13(a)).

In these four consolidated cases, claims for com-

³ Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C. 901 *et seq.*

pensation for "disability" were filed more than a year after the claimants sustained accidental physical injury. But each of the claims was filed, according to the findings of the Deputy Commissioners, within a year after the claimant had become disabled as a result of his physical injury in the sense that a compensable injury accrued. Thus, the question for decision is whether the statutory period of limitation begins to run upon a claim for compensation for "disability" when a claimant sustains accidental physical injury, or only when his physical injury thereafter becomes a legal injury which is compensable because it results in "disability," i.e., "incapacity * * * to earn the wages which the employee was receiving at the time of injury in the same or any other employment." If the former, since more than one year had elapsed between the dates of accidental physical injury and the filing of the claims, the claims herein are barred by limitations. If, on the other hand, the period of limitation begins to run, not from the time of the accident but only after a legal injury or claim for compensation for "disability" accrues, the claims were timely filed.

On the basis of its prior decision in *Kobilkin v. Pillsbury*, 103 F. 2d 667, affirmed by an equally divided court, 309 U.S. 619, 695, the court below has held that the period of limitation prescribed by Section 13(a) of the Act begins at the time of the accident or trauma. The contrary view, that the

period of limitation runs only after the physical injury has resulted in a legal or compensable injury, has been taken by the Courts of Appeals for the Third and District of Columbia Circuits. *Di Giorgio Fruit Corp. v. Norton*, 93 F. 2d 119 (C.A. 3), certiorari denied, 302 U.S. 767; *Potomac Electric Power Co. v. Cardillo*, 107 F. 2d 962 (C.A.D.C.); *Great American Indemnity Co. v. Britton*, 179 F. 2d 60 (C.A.D.C.). We submit that the question was correctly decided by the Courts of Appeals for the Third and District of Columbia Circuits.

I

The Term "Injury" in Section 13(a) of the Longshoremen's Act Means "Compensable Injury" and Not "Accident"

A. The Meaning of "Injury" in Section 13(a) Should Be Determined in the Light of the Language and Structure of the Act as a Whole, the Act's Humanitarian Purposes, Its Accepted Standard of Liberal Construction, and Its Legislative History.

Respondents' case is primarily founded on the proposition that, under their reading of the statutory definition in Section 2(2),⁴ the word "injury"

⁴ Section 2 provides:

When used in this Act—

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably

has a "clear and unambiguous" meaning throughout the Act which must be applied mechanically to Section 13(a), and which makes unnecessary any resort to traditional aids to construction (Br. in Opp. 9). Respondents further assert that the practical purpose of statutes of limitations—to bar stale claims—requires a narrow reading of "injury." (Br. in Opp. 19-21). It is urged that "if the Longshoremen's Act is inadequate * * * it is surely not for the courts to attempt to correct such omissions." (Br. in Opp. 11).

But, in view of the conflict of opinion among the several courts of appeals, it would hardly appear that the term "injury" in Section 13(a) is clear and unambiguous. And this Court has previously noted, in construing the Federal Employers' Liability Act, 35 Stat. 65, 45 U.S.C. 51-56, that the term "injury" cannot be read divorced from its setting in an act of broad humanitarian purposes. Thus, holding that silicosis is an "injury" within the meaning of the Federal Employers' Liability Act, the Court stated in *Urie v. Thompson*, 337 U.S. 163, 180-181:

Considerations arising from the breadth of the statutory language, the Act's humanitarian purposes, its accepted standard of liberal construction in order to accomplish those objects, the absence of anything in the

results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

legislative history indicating a congressional intent to require a restricted interpretation or expressly to exclude such occupational disease, and the trend of existing authorities dealing with the question, combine to support this conclusion.

Moreover, the Court has, with respect to the Longshoremen's Act itself, already rejected respondents' basic contention that the statutory definitions in Section 2 must always be applied literally and automatically throughout every other section.⁵ *Lawson v. Suwannee S.S. Co.*, 336 U.S. 198, 201. In the *Lawson* case, the question for decision was whether the definition of "disability" in Section 2(10) was to be read into Section 8(f)(1). If the definition was applicable, the employer was liable for compensation for permanent total disability where an employee received an injury which of itself would only cause permanent partial disability but which, combined with a previous non-industrial disability, in fact caused permanent total disability. If, on the other hand, the term "disability" was not employed in Section 8(f)(1) as a term of art, the employer was liable only for compensation for permanent partial disability, and the statutory "second injury fund" was liable for the balance of payments necessary to equal compensation for total disability. Holding that

⁵ By way of caution, we note at this point that we do not concede that the literal terms of Section 2 (2) are opposed to our position. See *infra*, pp. 24-27.

"disability" was not used as a term of art in Section 8(f)(1), the Court observed (*id.* at 201):

* * * Statutory definitions control the meaning of statutory words, of course, in the usual case. But this is an unusual case. If we read the definition into § 8(f)(1) in a mechanical fashion, we create obvious incongruities in the language, and we destroy one of the major purposes of the second injury provision; the prevention of employer discrimination against handicapped workers. We have concluded that Congress would not have intended such a result.

The Court has also pointed out that a statute of limitations cannot be construed with regard only to those practical ends generally served by statutes of limitations but must take account of the broad purpose of the legislation. *Reading Co. v. Koons*, 271 U.S. 58. There, the question was whether, in a death action brought under the Federal Employers' Liability Act, the cause of action arose at the time of injury or only upon the appointment of an administrator who could bring suit. Section 6 of the Act provided "that no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued." The Court observed that (*id.* at 61-62):

We do not think it is possible to assign to the word "accrued" any definite technical

meaning which by itself would enable us to say whether the statutory period begins to run at one time or the other; but *the uncertainty is removed when the word is interpreted in the light of the general purposes of the statute and of its other provisions*, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought. [Emphasis added.]

Adopting this line of inquiry, the Court concluded in the *Koons* case that the plaintiff's cause of action had accrued when the injury occurred more than two years prior to the institution of suit and that suit was therefore barred.

But this same line of inquiry led to the upholding, as timely, of another action brought under the Federal Employers' Liability Act, in *Urie v. Thompson*, 337 U.S. 163, a case where, like the present, the legal injury giving rise to the claim was long subsequent to the circumstances which eventually produced it. In *Urie*, the issue was whether, in an action to recover damages for silicosis arising from the conditions of plaintiff's employment, the cause of action arose when plaintiff was first exposed to physical injury by silica dust or only later when he suffered legal injury by becoming incapacitated for work. Alternatively, defendant argued that each inhalation of silica dust was a separate tort giving rise to a fresh cause of action, and that plaintiff was, therefore, limited to

a claim for inhalations within the period of limitation. Both of the defendant's constructions of the statute of limitations were rejected. The Court pointed out that, if it be assumed that Congress intended to include occupational diseases in the category of injuries compensable under the Act, "such mechanical analysis of the 'accrual' of petitioner's injury—whether breath by breath, or at one unrecorded moment in the progress of the disease—can only serve to thwart the congressional purpose." *Id.* at 169. Continuing, the Court stated (*id.* at 169-170):

If Urie were held barred from prosecuting this action because he must be said, as a matter of law, to have contracted silicosis prior to November 25, 1938, it would be clear that the federal legislation afforded Urie only a delusive remedy.

We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights. The record before us is clear that Urie became too ill to work in May of 1940 and that diagnosis of his condition was accomplished in the following weeks. There is no suggestion that Urie

should have known he had silicosis at any earlier date. * * *

It is apparent from the *Koons* and *Urie* cases that varying considerations may require the same provision for a period of limitation to be construed and applied in different ways. It is also apparent that words such as "injury" may have different meanings, depending upon the purpose and the context of the particular provision. Accordingly, the proper inquiry is to examine the general considerations affecting the present issue and to determine whether they support the rule announced below.

B. Read as "Compensable Injury," the Term "Injury" in Section 13(a) Is Consistent with Its Textual Context and Avoids Barring Compensation Claims for Disability Before They Arise.

Read as a whole, the language and structure of the Act compel the construction that "injury" in Section 13(a) refers to a legal or compensable injury and require rejection of the interpretation given by the court below. In holding that the period of limitation runs from the time of accident or physical injury instead of from the time a compensable injury accrues, the court below has held, in effect, that it begins to run before the cause of action accrues.

1. The Act does not recognize the mere fact that an employee is the victim of an accident as a legal

injury giving him a right to compensation; nor is mere pain and suffering a legal or compensable injury. The Act does not give an employee any right to compensation (other than the medical services and supplies provided for in Section 7) even if he sustains an accidental physical injury to his person. Under Section 3(a), compensation is payable only "in respect of disability or death"—disability being defined in Section 2(10) as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Compensation for disability, furthermore, is payable only if the incapacity to earn wages, *i.e.*, the "disability"—which may be temporary or permanent (Section 8)—lasts more than seven days. Section 6 provides that "no compensation shall be allowed for the first seven days of the disability," and Section 19(a) does not permit the filing of a claim for compensation until "any time after the first seven days of disability following any injury."⁶

⁶ Respondents apparently contend that Section 19(a) does permit the filing of a claim for compensation before the expiration of the first seven days of disability since employees are entitled to immediate medical benefits under Section 7 of the Act. (Br. in Opp. 18). However, such rights to medical benefits do not make an "accident" necessitating treatment a "compensable injury." Medical benefits are not "compensation" under the Act, *Marshall v. Pletz*, 317 U.S. 383, and the limitation provisions of Section 13(a) and Section 19(a) relate only to claims for "compensation" for "disability" or "death." In this connection, it should be noted that, contrary to respondents' assertions (Br. in Opp. 16-18, 26-27),

The statutory scheme, accordingly, is as follows: The employee (or his representative) can recover compensation only if the employee is killed, or rendered temporarily or permanently incapable of earning his customary wages; the death or disability must be the result of an accidental physical injury. The occurrence of an accident (a term not used in the statute) gives no right to compensation, nor does the sustaining of a physical injury; disability or death must result before a claim for compensation can accrue to the employee or his representative.

Since an employee cannot file a claim until he has been disabled (*i.e.* suffered loss of earning capacity), temporarily or permanently, for more than seven days, it would seem to follow as a matter of course that the period of limitation prescribed in Section 13(a) cannot start until the employee is thus disabled so that a claim for compensation has accrued. In other words, in Section 13(a), "injury" should be construed, as was done in the *Di Giorgio and Potomac Electric Power Co.* cases, *supra*, p. 15, to mean not the accidental physical injury but a legal injury or "compensable injury." The contrary reading, adopted by the court below,

we do not take the position that Section 19(a) prohibits one who has been permanently disabled as a result of an injury, without first having been temporarily disabled, from filing a claim because he never sustained seven days of temporary disability. We contend only that, whether the disability be temporary or permanent, Section 19(a) prevents the accrual of a cause of action and the filing of a claim for compensation before seven days of disability have elapsed.

would cause the period of limitation to run before the cause of action accrues and the employee becomes entitled to file a claim at all. Construing the word "injury" to mean "accident" would, in the case of a disability the accrual of which is delayed for more than a year after the accident, compel the employee to seek compensation before he could claim it, and bar his claim when he first becomes entitled to it.⁷ Cf. *Woods v. Stone*, 333 U.S. 472, 477. The incongruity of such a situation defeats any attempt to ascribe this intention to Congress. Cf. *Lawson v. Suwannee S. S. Co.*, 336 U.S. 198, 201.

2. Examination of the statutory definition of "injury" further substantiates the conclusion that that term was not employed in Section 13(a) as a synonym for "accident." Section 2(2) defines "injury" as (i) "accidental injury," or (ii) "death," either of which arises "out of and in the course of employment," and (iii) "occupational disease or infection as arises naturally out of such employment," or (iv) "as naturally or unavoidably results from such accidental injury," and (v) "includes an injury caused by the willful act of a third person." Footnote 4, *supra*, p. 15; *infra*, p. 56. Since "accidental injury" can mean only one thing

⁷ Compare *Esposito v. Marlin-Rockwell Corp.*, 96 Conn. 414, 114 Atl. 92; in which the court pointed out (96 Conn. at 418) that the Connecticut Compensation Law makes no provision for a claim for disability which an employee believes may arise in the future as a result of an accident. The same is true of the Longshoremen's Act. See also *Poster v. Hill Co.*, 30 D & C (Pa.) 657.

—physical injury resulting from an accident— and since “accident” cannot be defined in normal usage to mean “occupational disease or infection as arises naturally out of such employment” or “injury caused by the willful act of a third person,” it is apparent that “injury” is not always equivalent to “accident” under the Act. Moreover, the term “accidental injury” indicates by itself that “accident” and “injury” are different and not the same.

That “injury” does not mean “accident” is also demonstrated by the wording of Section 13(a), which provides that a claim for compensation must be filed “within one year after the injury” and “within one year after the death.” To read “injury” in Section 13(a) as meaning “accident” is to ignore the fact that “injury” includes “death” and that the period of limitation upon a claim for death expressly does not begin at the time of the accident, but only when the accident has culminated in death so as to constitute a legal or compensable injury. Cf. *International Mercantile Marine Co. v. Lowe*, 93 F. 2d 663, 665 (C.A. 2), certiorari denied, 304 U.S. 565; *Hitt v. Cardillo*, 131 F. 2d 233 (C.A.D.C.), certiorari denied, 318 U.S. 770. Obviously, death is not always or even generally concurrent with the accident; it frequently occurs at some later time. Further, as noted above, “injury” includes, within its statutory definition, occupational disease or infection resulting from

accidental injury. Implicitly, therefore, in cases where occupational disease or infection results from accidental physical injury, "injury" could not be defined as "accident" without barring claims for occupational disease which develops more than a year after the accident—a result plainly not contemplated by Congress. Cf. *Urie v. Thompson*, 327 U.S. 163.

It would seem to follow that, where an accident results in "accidental injury," the "injury" (within Section 13(a)) does not occur at the time of the accident, but, as in the case of death or occupational disease, only when there is a legal injury—when the resulting disability arises and the injury becomes compensable. We submit, therefore, that the Act intended to distinguish between "accident" and "injury" and not to equate them. To read "injury" as "accident" where trauma are concerned, would be to accord an inconsistent treatment under Section 13(a) to the three statutory kinds of "injury"—trauma, death, and occupational disease.

On the other hand, to read "injury" as "compensable injury" is to define that term in a manner which, as we have just shown, is consistent with its textual definition in Section 2(2), which harmonizes the several limitation provisions of Section 13(a), and which avoids the incongruity of an interpretation which would bar compensation claims before they arise. Thus read, the word "injury"

is given a meaning entirely in accord with the Act's humanitarian purposes and its established standard of liberal construction in order to accomplish those purposes.⁸ See *Baltimore & Phila. Steamboat Co. v. Norton*, 284 U.S. 408, 414; *Harbor Marine Contracting Co. v. Lowe*, 152 F. 2d 845, 847 (C.A. 2); certiorari denied, 328 U.S. 837; *Travelers Insurance Co. v. Branham*, 136 F. 2d 873, 875 (C.A. 4).⁹

⁸ The intention of Congress that the statute be liberally construed in favor of the employee is manifest in the Act itself. Section 20 provides that: "In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—(a) That the claim comes within the provisions of this Act. (b) That sufficient notice of such claim has been given. (c) That the injury was not occasioned solely by the intoxication of the injured employee. (d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another."

⁹ It should be observed that the word "injury" might be construed as "accident" in other sections of the Act. See Section 3(a) ("injury" must occur upon navigable waters of the United States), and cf. *Bethlehem Steel Co. v. Parker*, 163 F. 2d 334 (C.A. 4) (notification of injury). In still other provisions, it could not possibly mean "accident." See Section 7 ("such medical * * * attendance * * * as the nature of the injury * * * may require"), Section 30 (requiring reports concerning the "nature of the injury"), and the title of Section 33 ("Compensation for injuries where third persons are liable"). But there is no need to decide such issues in the instant cases; as shown in Point I, A (*supra*, pp. 15-21), the word "injury," wherever it occurs, should be construed in the light of the context, structure, and purposes of the Act, and its meaning in different places need not be the same if the context, structure, and purposes indicate otherwise. Cf. *Lawson v. Suwannee S.S. Co.*, 336 U.S. 198; *United States v. Champlin Refining Co.*, 341 U.S. 290.

That "injury" may properly be construed in various ways in different places of the Act is sharply illustrated by the construction the Supreme Court of Maine has given that term in its workmen's compensation law. Thus, it has in-

C. The Interpretation of "Injury" as "Compensable Injury" Accords with the Traditional Purposes of Statutes of Limitation.

The construction adopted by the court below not only lacks support in the language of the statute but is also opposed to well-established principles of construction of statutes of limitations. For it has long been settled, in this Court and other courts, that "it cannot be that the statute of limitations will be allowed to commence to run against a right until that right has accrued in a shape to be effectually enforced." *Borer v. Chapman*, 119 U.S. 587, 602; see also *Clark v. Iowa City*, 20 Wall. 583, 587; *Amy v. Dubuque*, 98 U.S. 470, 475; *Louisville & St. Louis Railroad v. Clarke*, 152 U.S. 230; *Dusek v. Pennsylvania R. Co.*, 68 F. 2d 131 (C.A. 7); *Cary v. Koerner*, 200 N.Y. 253, 259; *Cooke v. Gill*, L.R. 8 C.P. 107 (1873); *Read v. Brown*, L.R. 22 Q.B.D. 128 (1888); 19 Halsbury, *The Laws of England* (1911), p. 42; Wood, *Limitations* (4th Ed. 1916), § 122a.¹⁰

terpreted "injury" in that section of the state law which requires the employee to furnish medical services for two weeks "after the injury," and in the section requiring notice unless the employee knew of the "injury," to mean "accident;" but in the provision which requires claims to be filed within a year after the "injury," the word means "compensable injury" rather than "accident." *McKenna's Case*, 117 Me. 179, 103 Atl. 69; *Hustus' Case*, 123 Me. 428, 123 Atl. 514; *Bartlett's Case*, 125 Me. 374, 134 Atl. 163; *Fogg v. Woodcock Lunch*, 125 Me. 524, 134 Atl. 626.

¹⁰ See also *Paulson v. United States*, 78 F. 2d 97, 99 (C.A. 10); *Federal Reserve Bank v. Atlanta Trust Co.*, 91 F. 2d 283 (C.A. 5), certiorari denied, 302 U.S. 738; *Bass v. Standard Accident Insurance Co.*, 70 F. 2d 86, 87 (C.A. 4);

In tort actions based on negligence, it has usually been held that the statute of limitations starts running from the time of commission of the tort. The tort itself gives rise to a cause of action, at least for nominal damages, and the fact that substantial or increased damages resulting from the tort are not sustained until later is irrelevant. Cf. *Wilcox v. Plummer*, 4 Pet. 172; *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 117, 1200 ff; American Law Institute, *Restatement, Torts* (1939 ed.) § 899, comment c; Wood, *op. cit. supra*, § 179. But claims arising under workmen's compensation statutes do not sound in tort. They are not based upon any wrong to the employee by the employer but are a statutory incident of the employer-employee relationship, which imposes liability without fault rather than substituting a statutory tort for a common-law tort. *Bradford Electric Co. v. Clapper*, 286 U.S. 145, 157-158; *Crowell v. Benson*, 285 U.S. 22, 38, 41-42. Thus, Section 4(b) of the Longshoremen's Act expressly states that compensation is payable "irrespective of fault as a cause for the injury."

Because liability is imposed without fault under compensation statutes, pecuniary loss to the em-

Stevens v. McChrystal, 150 Fed. 85, 88 (C.A.-8); *Taylor v. Salt Creek Consol. Oil Co.*, 285 Fed. 532, 541 (C.A. 8); *Ewell v. Chicago & N.W. Ry. Co.*, 29 Fed. 57 (C.C.S.D. Iowa); *Crapo v. City of Syracuse*, 183 N.Y. 395, 402; *Dept. of Banking v. McMullen*, 134 Neb. 398, 345; *Farneman v. Farneman*, 46 Ind. App. 453, 457.

ployee, rather than a wrongful act on the part of the employer, is the legal injury which constitutes the essential element of the employee's claim. It is the "pecuniary risk" which is shifted by statute to the employer. *Arizona Employers' Liability Cases*, 250 U.S. 400, 420. For this reason, an employee who is physically injured as a result of the employer's negligence but who does not sustain legal injury by loss of earning capacity is not given a remedy. His legal rights under such statutes are invaded only in the event of disability or death. Since the employee has no claim, and is in no position to enforce any claim until he has been disabled from earning, it follows that the period of limitation does not run before such disability results.¹¹ "It would be unusual, to say the least, if a statutory scheme were to be construed to include a period during which an action could not be com-

¹¹ It is pertinent to observe that this same result obtains in some tort situations as well. Thus, where the damages themselves are an essential element in the cause of action, the statute of limitations runs from the time of damage rather than from the factual setting-into-motion of the forces which caused the damage. Cf. *Backhouse v. Bonomi*, 9 H. L. Cas. 503 (1861); *Roberts v. Read*, 16 East (K.B.) 215 (1812); *Attleboro Mfg. Co. v. Frankfort, etc., Ins. Co.*, 240 Fed. 573 (C.A. 1); *Cass v. Pennsylvania Co.*, 159 Pa. 273, 28 Atl. 161; *Church of Holy Communion v. Paterson Extension R. Co.*, 66 N.J.L. 218, 49 Atl. 1030; *Pollock v. Pittsburgh, B. & L.E.R. Co.*, 275 Pa. 467, 119 Atl. 547; *Sullivan v. Old Colony St. Ry. Co.*, 200 Mass. 303, 86 N.E. 511; *Miller v. Eskridge*, 23 N.C. 147; *Ludlow v. Hudson River R. Co.*, 6 Lans. (N.Y.) 128; *Gillon v. Boddington*, 1 C. & P. 541. (1824); *Whitehouse v. Fellowes*, 10 C.B. (N.S.) 765 (1861); see *Wilcox v. Plummer*, *supra*, at p. 181; *Northrop v. Hill*, 57 N. Y. 351, 358; *Halsbury, op. cit. supra*, vol. 20, p. 153; *Wood, op. cit. supra*, § 178.

menced as a part of the time within which it would become barred." *Woods v. Stone, supra* at 477. A contrary conclusion, we submit, cannot be reconciled "with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal right." *Urie v. Thompson, supra*, at 170.

This distinction between the application of statutes of limitations to tort cases on the one hand, and to workmen's compensation cases on the other hand, is well expressed in *Salt Lake City v. Industrial Comm.*, 93 Utah 510, 74 P. 2d 657, which was a workmen's compensation case governed by a one-year statute of limitations. The court overruled a long line of its own prior decisions which had held the period of limitation to begin at the time of accident, stating (93 Utah at 513):

Holding that the statute begins to run from the time of accident instead of from the time of compensable disability or loss, in effect makes the statute begin to run before the cause of action accrues. In negligence cases the cause of action arises from the negligence which causes the accident and therefore the statute begins to run from the time the negligence operated on plaintiff, which would be at the time of the accident. But no such rule applies in compensation cases. Compensation does not depend upon negligence. * * * Not until there is an accident and injury and a disability or loss from the injury does the duty

to pay arise. A mere accident does not impose the duty to pay. Accident plus injury therefrom does not impose the duty. But accident plus injury which results in disability or loss gives rise to the duty to pay. * * * ¹²

See also *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 302, 200 N.E. 824; *Plazak v. Allegheny Steel Co.*, 324 Pa. 422, 188 Atl. 130. We submit, therefore, that in the absence of a clear and unambiguous manifestation of Congressional intent that the period of limitation is to begin before the employee is entitled to recover compensation, no such conclusion should be drawn by the courts.

D. The Legislative History of the Longshoremen's Act Supports the View That "Injury" Means "Compensable Injury" in Section 13(a).

Disputing the correctness of the above analysis, respondents urge that, if Congress had intended the period of limitation to begin when an employee is

¹² For this reason, among others, we believe the position taken here is supported by this Court's decision in *McMahon v. United States*, No. 17, this Term, decided November 5, 1951, and is wholly consistent with our position therein. That case arose under a statute basing liability upon tort, not upon loss of earning capacity, and therefore having a different structure and presenting different considerations. Under that statute, a claimant's cause of action accrues and his substantive rights become fixed at the time of physical injury. In the instant cases, on the other hand, the employee has no claim for "accident" or "injury," nor does he have a claim for compensation at the moment of accidental physical injury; the claim is for "disability" and that claim arises only when "disability" results from loss of capacity to earn his customary wages.

disabled from earning and thus entitled to compensation, Congress would have employed the term "disability" rather than "injury" in Section 13(a) of the Act (Br. in Opp. 23-25).¹³ It can as soundly be argued that, if Congress had intended the period to begin at the time of the "accident," it would have employed that word rather than substituting for it the different word "injury" (see *infra*, pp. 34-40). We think it not without significance that Congress deliberately employed the word "injury."

Examination of the legislative history of the Longshoremen's Act reveals no discussion, either in the debates or in the reports of the Congressional committees, of the problems directly involved in this case.¹⁴ But a related phase of the

¹³ In this connection, it should be pointed out that we do not contend that "injury" in Section 13(a) is synonymous with "disability." We contend only that compensation for disability resulting from physical injury is not barred unless the claim is filed more than a year after the employee first becomes entitled to file a claim for disability resulting from such physical injury. Just as a single "accident" may cause several "injuries" (e. g., a sprained ankle, a broken arm, and a concussion), so a single "injury" may cause several "disabilities" (e. g., an occupational disease may disappear and then recur, or a fracture or wound may heal but subsequently lead to complications, so that repeated periods of "disability" are suffered from a single "injury"). Since Congress used the word "injury" rather than "disability," it may be that the period of limitation runs with respect to all disabilities arising out of a single injury after the injury has become compensable. But that question is not involved in the instant cases, just as it was not involved in *Kobilkin v. Pillsbury*, 309 U.S. 619. Contrary to respondents' assertions (Br. in Opp. 9-11), we do not argue that these are cases of "new and further disability."

¹⁴ See 67 Cong. Rec. 4119, 10608, 10614; 68 Cong. Rec. 5402, 5414, 5900-5909; S. Rept. 973, 69th Cong., 1st Sess.; H.

legislative history lends support to the view that "injury" should not be construed to mean "accident."

When the bill which became the Longshoremen's Act (S. 3170, 69th Cong., 1st Sess.; 67 Cong. Rec. 4119) was originally introduced in the Senate, Section 14 of the bill, containing provisions which were eventually embodied in Section 13 of the Act, provided that:

The right to claim compensation shall be barred unless within two years after the accident
* * * a claim for compensation shall be filed with the deputy commissioner * * *

A comparison of this provision of the bill with the language ultimately enacted into law shows that Congress reduced the statutory period from two years to one year, and also substituted the word "injury" for the word "accident."¹⁵ Despite the absence of Congressional comment upon the reasons

Rept. No. 1767, 69th Cong., 2d Sess.; Hearings, Senate Subcommittee on the Judiciary, on S. 3170, 69th Cong., 1st Sess., March 16 and April 2, 1926; Hearings, House Committee on the Judiciary, on S. 3170, 69th Cong., 1st Sess., June 26, 1926; cf. H. Rept. No. 1190, 69th Cong., 1st Sess., on H. R. 12063.

¹⁵ The bill, S. 3170, used the word "injury" at various points, and the word "accident" at others. In the statute as enacted, the word "accident" is not used except in its adjectival form describing an "accidental injury." Thus, "accident" in Section 10(a) of the bill became "injury" in Section 9(f) of the Act; "accident" in Section 12(a) of the bill became "injury" in Section 12(a) of the Act; "accident" in Section 12(e) of the bill became "injury" in Section 12(d) of the Act; and "accident" in Sections 27, 63, and 64 of the bill became "injury" in Sections 23(a), 41(a), and 41(b) of the Act, respectively.

for the change, it seems reasonably clear that the change would not have been made unless Congress intended that "injury" should have a meaning different from that of "accident." And that meaning must be, we submit, the meaning urged in this brief—i.e., that "injury" means "compensable injury."¹⁶

It may be urged that, despite the foregoing, "injury" should be construed to mean "accident" because of a decision, prior to the enactment of the Longshoremen's Act, of a New York court under the New York Workmen's Compensation Law, upon which the Longshoremen's Act is modeled. (H. Rept. No. 1190, 69th Cong., 1st Sess.; *Law-*

¹⁶ Respondents apparently urge that Congress' rejection of "accident" in favor of "injury" was due merely to the circumstance that "accident" would not have been appropriate in occupational disease cases (Br. in Opp. 8). But there is no reason why Congress could not, had it so desired, have specified, as does the New York Law (*infra*, p. 36, note 18), that the period of limitation should run from the "accident" in accidental injury cases, and from the time of infection or disability in disease cases. (Cf. also, the Amendment of 1927 to the Connecticut Statute, Pub. Acts, 1927, ch. 307, Sec. 5, which requires that claims be filed within a year "from the date of the accident or from the first manifestation of a symptom of the occupational disease, as the case may be, which caused the personal injury"). Furthermore, various state compensation laws enacted prior to the Longshoremen's Act had provided that the period of limitation should run from the "accident" (e.g., New York Laws, 1918, ch. 623), and Congress by express amendment declined to adopt such provisions in the federal act. Respondents' argument works against them, in fact, because if "injury" be construed as "accident" with respect to accidental injuries, the word must have a different meaning in occupational disease cases where there is no "accident." Under our construction, "injury" has the same meaning with respect to both accidental injuries and occupational diseases.

son v. Suwannee S.S. Co., supra, at 205). The New York Workmen's Compensation Law, as originally enacted (L. 1913, ch. 816),¹⁷ provided, in Section 18, that notice of an injury "for which compensation is payable" should be given within ten days after "disability." Section 28 provided that—

The right to claim compensation * * * shall be forever barred unless within one year after the injury * * * a claim for compensation thereunder shall be filed with the commission.

These provisions, apparently without undergoing any judicial review, were amended (L. 1918, ch. 634) by the substitution of the phrase "within thirty days after the accident causing such injury" in Section 18, and by a provision changing the word "injury" in Section 28 to "accident" and adding a requirement that the bar shall be deemed waived unless the objection be raised "on the hearing" of the claim.¹⁸

¹⁷ The law was declared unconstitutional (*Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271) but was reenacted, after adoption of an amendment to the state constitution, by L. 1914, ch. 41. It is now Chapter 67 of the Consolidated Laws of New York (Book 64, McKinney's Consolidated Laws of New York).

¹⁸ Sec. 28 was again amended by L. 1928, ch. 754, to extend to the Commission the power to permit the filing of a claim after expiration of one year after the accident, whenever it should find such filing to be "in the interest of justice." Under Sec. 38 of the New York law, "disablement" in occupational disease cases is treated as the equivalent of "accident" in accidental injury cases.

In 1919, the Appellate Division of the Supreme Court, Third Department, had occasion to consider the limitation provisions of the earlier statute (in which "injury" was used) in *O'Esau v. E. W. Bliss & Co.*, 188 App. Div. 385, 177 N.Y. Supp. 203. In that case, the employee suffered an accident on March 28, 1916, which caused him to lose three weeks of work. The State Commission found that the accident incapacitated him for the performance of his usual work, and that he would have been disabled from working from the date of the accident had not his employer kept him on as a foreman, at the same wages which he had theretofore received as a workman, for more than a year after the accident. The employee was discharged on April 30, 1917, and subsequently died as a result of the injury on March 21, 1918. His claim for disability compensation was filed more than a year after the accident. It was urged on behalf of the decedent's representative that the employer was estopped from interposing the defense of limitations because he had kept the employee on at his old wages, thus inducing the employee to delay in filing his claim. The court held that the limitation provision was jurisdictional, and that the employer could not be estopped from invoking it.

In so holding, the court stated, at one point, that the law required the claim to be filed within one year from "the date of the accident" (188 App. Div., at 389). Elsewhere, the court employed

the word "injury," observing that the limitation provision "is clearly a jurisdictional fact; without the filing of the claim within one year from the injury the Commission is powerless to act * * *." (188 App. Div., at 389). In view of the court's indiscriminate use of the two terms without an express declaration that they were synonymous under the statute; we do not believe the court intended to make any ruling on that point. Indeed, such a ruling was unnecessary. Whether or not "injury" meant "accident" under the statute, they were factually identical in the circumstances of the particular case. The findings of the State Commission, quoted by the court (188 App. Div., at 387), show that the employee was injured and actually disabled from doing his former work from practically the date of the accident. Cf. *McLaughlin v. Western Union Telegraph Co.*, 17 F. 2d 574 (C.A. 5). Undoubtedly for that reason, the distinction here advanced between "accident" and "injury" was not urged upon the court, which stated that the argument of estoppel presented the only question in the case. Since the employee presumably knew, or had reason to know, that he had been disabled from the date of the accident, it necessarily followed that the period of limitation began to run from the date of the accident and was not suspended by the action of the employer in retaining him at his former wages in the entirely different capacity of foreman. Cf. *Twin Harbor*

Stevedoring & Tug Co. v. Marshall, 103 F. 2d 513 (C.A. 9). We submit, therefore, that the *O'Esau* case in no way compels the construction of "injury" in the Longshoremen's Act as meaning "accident."

In any event, this decision of a single department of the Appellate Division, unreviewed by the Court of Appeals,¹⁹ certainly does not establish a known and settled interpretation of the New York statute by the courts of New York which can be deemed to have been adopted by Congress in the passage of the Longshoremen's Act. Cf. *Carolene Products Co. v. United States*, 323 U.S. 18, 26. The New York law was amended in 1918, one year before the *O'Esau* decision and eight years before the passage of the Longshoremen's Act, by substituting "accident" for "injury." That amendment, it may be assumed, was made for the express purpose of ensuring that the period of limitation would begin at the date of the "accident," since under the original language (using "injury") the normal construction would have been that the period would start when the employee became entitled to compensation. Cf. *Landauer v. State Industrial Accident Comm.*, 175 Ore. 418, 154 P. 2d 189, and cases there collected. Yet Congress, aware

¹⁹ In light of the views subsequently expressed by the New York Court of Appeals in *Schmidt v. Merchants Despatch Transp. Co.*, 270 N. Y. 287, 302, 200 N. E. 824, 827-828, it is doubtful that that court would have construed "injury" to mean "accident."

of amendments to the New York law which it used as a model,²⁰ refused to adopt the language of the amended New York statute and instead, by express amendment to the bill, substituted "injury" for "accident." Cf. *Federal Mutual Liability Ins. Co. v. Locke*, 60 F. 2d 895 (C.A. 2). Thus, even had the *O'Esau* case been a clear and authoritative construction of the old wording, Congress' failure to adopt the New York statute's amended language would have shown an intention that the period of limitation in the federal act should not start with the accident. Otherwise, Congress' substitution of "injury" for "accident" was a futile gesture and effected no change in meaning. It seems much more probable that Congress intended to adopt the construction of "injury" as meaning "compensable injury," as had been the more usual holding under state compensation acts in which the word "injury" was used (*infra*, pp. 40-42).

E. Where State Statutes Employ Limitation Provisions Substantially Similar to That of the Longshoremen's Act, the Clear Weight of Authority Is That "Injury" Means "Compensable Injury".

Cases in the state courts construing state compensation acts are, of course, not controlling in

²⁰ The fact that the New York act had been amended was expressly adverted to in two Congressional committee reports, although no reference to any particular amendment was made. H. Rep. No. 1190, 69th Cong., 1st Sess., on H. R. 12063; H. Rep. No. 1422, 70th Cong., 1st Sess.

interpreting the Longshoremen's Act. The limitation provisions of the various state acts differ extensively, some use the word "injury" as does the Longshoremen's Act, some use "accident," some have special governing definitions, and some have entirely different provisions. But where state statutes employ language substantially similar to that of the Longshoremen's Act, the clear weight of opinion, as the Courts of Appeals for the Third and District of Columbia Circuits pointed out in the *Di Giorgio* and *Potomac Electric Power Co.* cases, *supra*, p. 15, is that "injury" means "compensable injury." See *Donaldson v. Calvert McBride Printing Co.*, 232 S.W. 2d 651 (Ark.); *Marsh v. Industrial Accident Comm'n*, 217 Cal. 338, 18 P. 2d 933; *Esposito v. Marlin-Rockwell Corp.*, 96 Conn. 414, 114 Atl. 92; *Burke v. Industrial Accident Comm'n*, 368 Ill. 554, 15 N.E. 2d 305; *Farmers Mutual Liability Co. v. Chaplin*, 114 Ind. App. 372, 51 N.E. 2d 378; *Guderian v. Sterling Sugar & Ry. Co.*, 151 La. 59, 91 So. 546; *Hustus' Case*, 123 Me. 428, 123 Atl. 514; *Clausen v. Minnesota Steel Co.*, 186 Minn. 80, 242 N.W. 397; *Wheeler v. Missouri Pac. R. Co.*, 328 Mo. 888, 42 S.W. 2d 579; *Anderson v. Contract Trucking Co.*, 48 N.M. 158, 146 P. 2d 873; *Rosa v. George A. Fuller Co.*, 74 R.I. 215, 60 A. 2d 150; *Acme Body Works v. Koepsel*, 204 Wis. 493, 234 N.W. 756, 236 N.W. 378; *Baldwin v. Scullion*, 50 Wyo. 508, 62 P. 2d 531; see also Br. for Resp. Pillsbury, in *Kobilkin*

v. *Pillsbury*, No. 204, Oct. Term 1939, pp. 32-33, Appendix, C, pp. 54-62.

Insofar as state decisions rendered prior to the enactment of the Longshoremen's Act may be of significance in attributing an intention to Congress to adopt the then prevailing construction of the term "injury" in state compensation laws, it is to be noted that, the courts of Connecticut,²¹ Indiana,²² Louisiana²³ and Maine²⁴ had construed "injury," in the limitation provisions of acts fairly comparable to the subsequently enacted federal act, to mean "compensable injury" rather than "accident." The courts of Nebraska had adopted the same rule even though the Nebraska statute used the word "accident." *Johansen v. Union Stock Yards Co.*, 99 Neb. 328 (1916). See also *Frank Martin-Laskin Co. v. Goetsch*, 172 Wis. 548 (1920). A contrary result had been reached only in Michigan²⁵ and perhaps in New York²⁶ and Oregon.²⁷

²¹ *Esposito v. Marlin-Rockwell Corp.*, 96 Conn. 414, 114 Atl. 92 (1921); *Hines v. Norwalk Lock Co.*, 100 Conn. 53 (1924).

²² *In re McCaskey*, 65 Ind. App. 349, 117 N. E. 268 (1917); *Hornbrook-Price Co. v. Stewart*, 66 Ind. App. 400, 118 N. E. 315 (1918).

²³ *Guderian v. Sterling S. & R. Co.*, 151 La. 59, 91 So. 546 (1922).

²⁴ *Hustus Case*, 123 Me. 428, 123 Atl. 511 (1924).

²⁵ *Cooke v. Holland Furnace Co.*, 200 Mich. 192, 166 N. W. 1013 (1918).

²⁶ In the *O'Esau* case analysed *supra*, pp. 35-39.

²⁷ The Oregon decision (*Lough v. State Industrial Accident Comm'n*, 104 Ore. 313, 207 Pac. 354) was rendered after legislative repeal of an express statutory provision which started the period of limitation at the time "the right [to compensation] accrued."

F. Summary.

We submit that the construction of "injury" in Section 13(a) of the Longshoremen's Act as meaning a legal or "compensable injury," and not an accidental physical injury, is supported by the language and structure of the Act, by its legislative history, and by the underlying rationale of statutes of limitations. It is supported, moreover, by every consideration relating to the general aims of the Act, the sphere in which it operates, and the basic principle of construction announced by this Court as applicable to the Longshoremen's Act. *Baltimore & Phila. Steamboat Co. v. Norton*, 284 U.S. 408, 414.

If the time for filing claims begins, as the court below held, from the accident rather than when the injury becomes compensable, it will be necessary for each employee who meets with an accident, whether or not he suffers a legal injury, or disability, or loss of pay, to file a claim for compensation as a matter of self-protection although he may be fully cognizant that he has suffered no legal injury and has no right to receive compensation and fully expects that his claim will be rejected. This interpretation of the Act will not be readily understood by those whom the Act seeks to protect, and would thus operate to their detriment. In particular, a disabled workman who has been paid full wages will not readily regard himself as entitled to compensation in addition to full wages, and an

unscrupulous employer may lull an employee into allowing the short limitations period to run by paying full wages for a year and then dismissing him. Cf. *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 F. 2d 513, 516 (C.A. 9).

Further, the interpretation of the court below is one which would impair effective administration of the Act. Thus, in the San Francisco Compensation District (under the Longshoremen's Act) alone, some 27,000 physical injuries were reported under the Act in 1946 (the last year in which detailed figures were reported) or 74 for each calendar day, in which the disability was 7 days or less. If claims must be filed in all such cases to avoid the period of limitations, it would be necessary for the Deputy Commissioner, pursuant to the requirements of Section 19 of the Act (33 U.S.C. 919), upon receipt of each claim, to give notice thereof to the employer and compensation carrier, to investigate, to hold hearings and to adjudicate each claim. It is doubtful that the Deputy Commissioner could perform these statutory functions and do justice to the claims actually compensable under the Act. We submit that such are likely to be the results if the rule adopted by the court below prevails.

The Record Supports the Deputy Commissioners' Findings That the Claims Were Filed Within One Year After the Injuries Became Compensable

Having shown that "injury" in Section 13(a) should be read as "compensable injury," there remains the further question of when the injuries in these cases became compensable. In general, "disability" accrues and an injury becomes compensable when the employee is incapable (for more than seven days (Sec. 6)) "because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." (Section 2(10)). This definition embodies two distinct concepts. There must be, of course, an accidental physical injury. But physical injury or pain is not, in itself, enough to warrant a finding of disability. The legal injury which is compensated is a pecuniary one. Economic injury must be present. The accident must result not only in physical damage to the employee but must also impair his wage-earning capacity before a claim for compensation accrues. If the disability is total in nature, the employee is entitled to receive, as compensation, 66 $\frac{2}{3}$ percent of his prior average weekly wages during the continuance of the disability (Section 8, subdivisions (a) and (b)). In cases of temporary partial disability resulting in decrease of earning capacity, compensation is two-thirds of the difference between

the injured employee's average weekly wages before the accidental physical injury and his wage-earning capacity after such injury in the same or another employment, during the continuance of the disability for a period not exceeding five years (Section 8(e)). On the other hand, economic injury is conclusively presumed where the employee suffers a schedule loss and thus becomes permanently disabled, *i.e.*, where the employee loses, or loses the use of, a body member (Section 8, subdivisions (a) and (c)).

Thus, the statutory scheme is as follows: Where an accident results in an injury other than a schedule loss, the injury becomes compensable when and only when the employee suffers a loss of earning capacity. However, if the accident results in an injury which is a schedule loss, that injury becomes compensable as soon as the schedule loss is sustained. Accordingly, our factual inquiries as to when the injuries herein became compensable must necessarily be approached with regard to the nature of those injuries. In three of the cases at bar (Johnson, Curnutt, and Manos), no schedule losses were incurred. Their injuries, therefore, became compensable only when their earning capacity was impaired. In the fourth case (Shallat), a schedule loss was involved. His injury, therefore, became compensable as soon as he sustained the schedule loss. Because of these factual dif-

ferences in the cases, they will be treated separately in the discussion which follows.

1. *Johnson, Curnutt, and Manos.*

Johnson, Curnutt, and Manos were physically injured on the dates of their accidents, more than one year prior to the filing of their claims. Their claims were filed, however, according to the findings of the Deputy Commissioners, within one year after they had suffered legal or economic injury. Although the Deputy Commissioners did not make express findings, in so many words, as to when the claimants became incapable of earning their former wages, they did make findings with respect to the dates on which the employees suffered loss of wages. Since the Deputy Commissioners further found that the employees had not been disabled prior to the dates on which they sustained loss of wages, it must be presumed from these ultimate findings that the Deputy Commissioners were of the opinion that the employees' wage-earning capacity had not, in fact, been impaired prior to their first loss of wages.²⁸

²⁸ The district court apparently was of the opinion that the Deputy Commissioners had ruled as a matter of law that the claimants' injuries could not become compensable prior to a loss of wages. In view of the plain language of the Act which makes wage-earning capacity the test of disability, rather than loss of wages, and the many cases which have so construed the Act (*Hartford Accident & Indemnity Co. v. Hoage*, 85 F. 2d 420 (C.A.D.C.); *Flores v. Bay Ridge Operating Co.*, 131 F. 2d 310 (C.A. 2); *Luckenbach S.S. Co. v. Norton*, 96 F. 2d 764 (C.A. 3); *Burley Welding Works v. Lawson*, 141 F. 2d 964 (C.A. 5); *Twin Harbor Stevedoring & Tug Co. v. Marshall*,

Respondents argue that the claimants' earning capacity had in fact been reduced, and that claims for compensation therefore arose, long prior to any loss of wages. It is asserted that the full wages paid to the employees following their accidents were not wages earned by them but were charitable gifts paid, in part, because of the exceptional consideration of their sympathetic employers. But the question of wage-earning capacity is one of fact to be determined by the Deputy Commissioners (Section 8(h)). Cf. *Hartford Accident & Indemnity Co. v. Hoage*, 85 F. 2d 420, 423 (C.A.D.C.); *Flores v. Bay Ridge Operating Co.*, 131 F. 2d 310, 311 (C.A. 2); *Luckenbach S.S. Co. v. Norton*, 96 F. 2d 764, 765 (C.A. 3); *Burley Welding Works v. Lawson*, 141 F. 2d 964, 966 (C.A. 5); *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 F. 2d 513, 515 (C.A. 9).

103 F. 2d 513 (C.A. 9)), we do not believe the findings of the Deputy Commissioners can be so read:

In any event, if we are mistaken in our reading of those findings, it plainly was reversible error for the district court not to remand the cases to the Deputy Commissioners for further findings instead of reappraising the evidence itself and making its own independent findings on this critical point. See *O'Leary v. Brown-Pacific-Maxon*, 340 U. S. 504; *Cardillo v. Liberty Mutual Ins. Co.*, 330 U. S. 469; *Marshall v. Pletz*, 317 U. S. 383. Accordingly, if this Court should be of the view that the Deputy Commissioners failed to make the necessary findings on loss of wage-earning capacity, the cases should be remanded to them for further findings and an order in accordance with the law as declared by this Court. If the Deputy Commissioners can make the necessary findings on the present record, they should do so; if not, further hearings should be held. Cf. *Panama Mail S.S. Co. v. Vargas*, 281 U. S. 670, 672.

And the implicit findings of the Deputy Commissioners that no impairment of earning capacity occurred prior to loss of wages must be accepted if supported by substantial evidence on the record considered as a whole. *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504; *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469; *Marshall v. Pletz*, 317 U.S. 383.

The undisputed evidence reveals that each of the employees, following his accident, returned to his employment at his former wages. Under the Act, such actual earnings were *prima facie* evidence of their earning capacity. Section 8(h) provides that, in cases of partial disability such as are here involved, the "wage-earning capacity of an injured employee * * * shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity." It is true that the employees were given lighter work by their employers on the advice of their physicians. But the Act does not provide that an employee is disabled merely when he is physically incapable of performing every part of his prior duties; he must be incapable of earning his former wages "in the same or any other employment."²⁹ And there is nothing in the record to

²⁹ In contrast to the present provision of the Act defining disability in terms of incapacity to earn the wages which the employee was earning at the time of injury in the same or any other employment, the original form of S. 317C provided that (Sec. 2(2)) "Disablement" means disablement from

show that the wages the employees received for such lighter work were not the customary wages for such lighter work, or that the employees did not fully earn the wages paid for such lighter work. Indeed, in the case of Manos, the record shows that, after his job was terminated because of a general reduction in employment at the shipyard, he was able to obtain another job doing such lighter work (shop welding rather than welding aboard ship) at a slightly higher wage rate (MR. 29). Nor is there any evidence in the record that the employees knew, or had reason to know, that their earning capacity was less than the wages they were receiving.³⁰ In none of these three cases did the employer

earning full wages at the work at which the employee was last employed." See Hearings, Senate Subcommittee on the Judiciary, on S. 3170, 69th Cong., 1st Sess., p. 1.

³⁰ That the employees knew they had been physically injured, were suffering pain, and performed their duties with some difficulty, is irrelevant. As previously noted, no provision is made in the Act for compensation for mere pain and suffering. Since the employees continued to receive their former wages, and in the absence of evidence that they did not fully earn those wages, it was entirely reasonable for them to believe that their earning capacity had not been impaired prior to a loss of wages, and that, prior to that time, they had no claims for compensation for disability. Cf. *Urie v. Thompson*, *supra*. In this respect, the decisions of the Courts of Appeals for the Third and District of Columbia Circuits to which we have previously adverted (*Di Giorgio Fruit Corp. v. Norton*, 93 F. 2d 119 (C.A. 3), certiorari denied, 302 U. S. 767; *Potomac Electric Power Co. v. Cardillo*, 107 F. 2d 962 (C.A.D.C.); *Great American Indemnity Co. v. Britton*, 179 F. 2d 60 (C.A.D.C.)) present a close analogy. Although in those cases, as respondents point out, the injuries were latent, while in the instant case they were patent, the underlying problem was the same, i.e., whether the period

allege, or offer to prove, that the employee had been kept on at his former wages solely because of the sympathetic or charitable attitude of the employer, and that the employee had been advised of that fact.³¹ We submit, therefore, that the record fully supports the Deputy Commissioners' findings that these claims were timely filed.

2. *Shallat*.

Unlike the preceding cases, the case of Shallat involves a schedule loss under Section 8 of the Act. Shallat injured his left hand on November 21, 1947, while employed as a stevedore. He sustained a contusion of the left hand and exacerbation of a pre-existing progressive arthritis of the proximal joint of the second or middle finger. He lost no

of limitation should be permitted to run before the employee knew, or should have had reason to know, that a claim for compensation for disability had accrued.

³¹ If the employees had been so advised, timely claims for compensation would presumably have been filed upon the receipt of such knowledge. It is clear that if the employees had filed claims shortly after the accidents, and had shown loss of *wage-earning capacity* at that time, the Deputy Commissioner could have awarded compensation. *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 F. 2d 513, 515 (C.A. 9).

It is to be observed, however, that, in such cases, the act permits the employee to recover compensation in full notwithstanding the fact that the employer has charitably continued to pay him his old wages. Cf. *Twin Harbor Stevedoring & Tug Co. v. Marshall*, *supra*; *Hertford Accident & Indemnity Co. v. Hoage*, 85 F. 2d 420 (C.A.D.C.). This circumstance makes it unlikely that the employees here were kept on at their former wages solely because of the charitable attitude of their employers. If charity did extend so far, we think it strange that the point was not raised at the hearings before the Deputy Commissioners.

time as a result of the accident and continued at the same employment, presumably at the same wages. According to his testimony, his hand pained him considerably, and he applied self-treatment. The pain progressively became more severe, and he filed a claim for compensation on May 23, 1949, eighteen months after the accident. Upon this evidence, the Deputy Commissioner found that Shallat had not sustained any temporary disability, and thus had not become entitled to compensation until the condition of his left second finger reached a permanent stage and became a permanent disability. He further found that Shallat sustained a permanent disability amounting to loss of 50 per cent of the use of his finger within one year prior to the filing of his claim, and held that the claim is not barred by limitations (SR. 6).³²

Accordingly, the only factual questions presented with respect to Shallat's claim are: (i) whether the Deputy Commissioner erred in finding the absence of any temporary disability, and (ii) whether the Deputy Commissioner erred in finding that Shallat's permanent disability became fixed within one year prior to the filing of the claim.

³² Section 8(c)(9) provides for payment of 66⅔ per cent of the average weekly wages for eighteen weeks for loss of the second finger. Section 8(c)(19) provides that "compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member." Since Shallat's average weekly wages were \$90.00 (SR 6), and since he sustained only a 50 per cent loss of use of his second finger, he was awarded compensation for nine weeks at \$25.00 per week (SR 6-7).

If Shallat had been temporarily disabled, a claim for compensation would have arisen prior to the time his permanent disability became fixed. If such temporary disability accrued more than one year prior to the filing of his claim, it might be argued that the claim for permanent disability would be barred by limitations.³³ On this record, however, no such contention can properly be made. As previously noted, *supra*, p. 49, the actual earnings of an employee are *prima facie* evidence under the Act of his earning capacity, and there is no evidence here to rebut this presumption. The record shows, without contradiction, that Shallat lost no time as a result of the accident and continued at the same employment, presumably at the same wages (SR. 24-25). That he performed his work with some difficulty and pain does not, of course, mean that he had a claim for compensation for disability, in the absence of any showing of impairment of wage-earning capacity.

The Deputy Commissioner's finding that Shallat did not permanently lose 50 per cent of the use of his left second finger until within one year of the filing of the claim is similarly supported by substantial evidence on the record as a whole. The only evidence to the contrary is Shallat's statement at the beginning of his testimony that "the left hand is still the same as it was when I got injured."

³³ But see note 13, *supra*, p. 33).

(SR. 27). However, Shallat further testified that he had not filed a claim earlier because "I thought it wasn't so serious. I thought it would work its way out. I took it upon my own. I thought it would gradually work itself out." (SR. 28). He first raised a question about his claim on March 11, 1949 (the accident occurred on November 21, 1947), because "it was getting more and more severe. * * * It got to the point it was too severe for me and I couldn't figure out what should be done." (SR. 28). And when asked by respondents' counsel why he had applied self-treatment instead of filing for medical benefits, Shallat replied that "I didn't think it serious. * * * I thought it wasn't so serious until it gradually proved itself serious." (SR. 29-30). Finally, the report of the physician who examined him four days after the accident reveals that the physician was, at that time, of the opinion that the injury would not result in a permanent defect (SR. 32). This is more than substantial evidence that the disability occurred within a year prior to May 23, 1949 (when the claim was filed). We submit, therefore, that the Deputy Commissioner's finding that Shallat's claim for a schedule loss was timely filed must be accepted. *O'Leary v. Brown-Pacific-Maxon, supra*; *Cardillo v. Liberty Mutual Ins. Co., supra*; *Marshall v. Pletz, supra*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be reversed.

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NOVEMBER 1951.

APPENDIX

The relevant provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended (44 Stat. 1424, 48 Stat. 806, 52 Stat. 1164, 62 Stat. 602, 33 U.S.C. 901 *et seq.*) are as follows:

SEC. 2. When used in this Act—

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(11) "Death" as a basis for a right to compensation means only death resulting from an injury.

(12) "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this Act, and includes funeral benefits provided therein.

SEC. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (in-

cluding any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

* * * * *

SEC. 4. (b) Compensation shall be payable irrespective of fault as a cause for the injury.

* * * * *

SEC. 6. (a) No compensation shall be allowed for the first seven days of the disability, except the benefits provided for in section 7: *Provided, however,* That in case the injury results in disability of more than forty-nine days, the compensation shall be allowed from the date of the disability.

* * * * *

SEC. 7. (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for such period as the nature of the injury or the process of recovery may require.* * *

* * * * *

SEC. 8. Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent $66\frac{2}{3}$ per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs or both eyes, or of any two thereof

shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

(b) Temporary total disability: In case of disability total in character but temporary in quality $66\frac{2}{3}$ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be $66\frac{2}{3}$ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

* * * * *

(9) Second finger lost, eighteen weeks' compensation.

* * * * *

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

* * * * *

(e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between

the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

* * * * *

(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c) (21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

* * * * *

SEC. 13. (a) The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim there-

for is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

* * * * *

SEC. 19. (a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Administrator at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

* * * * *

SEC. 21. (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by

any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the district court of the United States for the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

* * * * *

(d). Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 18.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 223 229

Office-Supreme Court, U. S.

FILED

SEP 13 1951

CHARLES ELMORE CRAWLEY
CLERK

WARREN H. PILLSBURY, Deputy Commissioner
for The Thirteenth Compensation District,
Under The Longshoremen's and Harbor
Workers' Compensation Act, *Petitioner,*
vs.

UNITED ENGINEERING COMPANY, a Corporation,
and FIREMAN'S FUND INSURANCE COMPANY,
a Corporation, *Respondents.*

WARREN H. PILLSBURY, Deputy Commissioner
for The Thirteenth Compensation District,
Under The Longshoremen's and Harbor
Workers' Compensation Act, *Petitioner,*
vs.

UNITED ENGINEERING COMPANY, a Corporation,
and FIREMAN'S FUND INSURANCE COMPANY,
a Corporation, *Respondents.*

WARREN H. PILLSBURY, Deputy Commissioner
for The Thirteenth Compensation District,
Under The Longshoremen's and Harbor
Workers' Compensation Act, *Petitioner,*
vs.

MATSON TERMINALS, INC., a Corporation, and
FIREMAN'S FUND INSURANCE COMPANY, a
Corporation, *Respondents.*

ALBERT J. CYR, Deputy Commissioner for The
Thirteenth Compensation District, Under The
Longshoremen's and Harbor Workers' Com-
pensation Act, *Petitioner,*
vs.

UNITED ENGINEERING COMPANY, a Corporation,
and FIREMAN'S FUND INSURANCE COMPANY,
a Corporation, *Respondents.*

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 223

WARREN H. PILLSBURY, Deputy Commissioner
for The Thirteenth Compensation District,
Under The Longshoremen's and Harbor
Workers' Compensation Act, *Petitioner,*

vs.

UNITED ENGINEERING COMPANY, a Corporation,
and FIREMAN'S FUND INSURANCE COMPANY,
a Corporation, *Respondents.*

WARREN H. PILLSBURY, Deputy Commissioner
for The Thirteenth Compensation District,
Under The Longshoremen's and Harbor
Workers' Compensation Act, *Petitioner,*

vs.

UNITED ENGINEERING COMPANY, a Corporation,
and FIREMAN'S FUND INSURANCE COMPANY,
a Corporation, *Respondents.*

WARREN H. PILLSBURY, Deputy Commissioner
for The Thirteenth Compensation District,
Under The Longshoremen's and Harbor
Workers' Compensation Act, *Petitioner,*

vs.

MATSON TERMINALS, INC., a Corporation, and
FIREMEN'S FUND INSURANCE COMPANY, a
Corporation, *Respondents.*

ALBERT J. CYR, Deputy Commissioner for The
Thirteenth Compensation District, Under The
Longshoremen's and Harbor Workers' Com-
pensation Act, *Petitioner,*

vs.

UNITED ENGINEERING COMPANY, a Corporation,
and FIREMAN'S FUND INSURANCE COMPANY,
a Corporation, *Respondents.*

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of California, Southern Division (JR. 15; CR. 15; SR. 14; MR. 15)¹ is reported at 93 F. Supp. 898. The opinion of the United States Court of Appeals for the Ninth Circuit (JR. 44; CR. 70; SR. 42; MR. 56) is reported at 187 F. (2d) 987.²

JURISDICTION.

The judgments of the Court of Appeals were entered on March 14, 1951. (JR. 48; CR. 74; SR. 46; MR. 60). By order of Mr. Justice Black dated June 7, 1951, the time for applying for certiorari was extended to and including August 11, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED.

Whether the one-year period of limitation upon the filing of claims for compensation, as clearly defined by Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act, can properly

¹We shall employ the same designations for the records as those adopted by petitioners, namely, JR., CR., SR. and MR. (See footnote 2 of Petition.)

²Because of the existence of a question of law common to each of the four cases, they were consolidated both for trial and on appeal, and all four cases were dealt with in single opinions both in the District Court and the Court of Appeals.

be interpreted by judicial decree to mean that it shall commence from the date disability results rather than from the date of injury.

STATUTE INVOLVED.

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. 901 et seq., are set out in the Appendix A.

The material provisions of Section 13(a) of said Act, 33 U.S.C. 913(a), are as follows:

"The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury * * * except that if payment of compensation has been made without an award on account of such injury * * * a claim may be filed within one year after the date of the last payment * * *".

STATEMENT OF THE CASE.

We shall refer briefly to certain material facts in each of the consolidated cases which were not included in petitioners' statement of the case.

The Johnson case (No. 12,644 below).

Claimant Johnson who was injured on May 28, 1947, filed a claim on January 17, 1949. No compensation was paid. At the hearing held before appellant Deputy Commissioner he testified that on March

15, 1948 he suffered a reduction in pay by reason of having been "lowered from leaderman to welder" at which time claimant "was told by Dr. Dixon and Dr. Holcomb, both, not to use a heavy * * *". (JR. 28.) It was after that, namely, May 15, 1948, that a change occurred in ownership of the employing firm, at which time claimant was assigned to work on boats which he could not do, and as a result was laid off. (JR. 29.) Medical reports introduced in evidence (JR. 33-35) indicate claimant had suffered considerable and continuing injury to his neck and that claimant's condition was such that he was unable to sleep, that he had pain extending from the base of his neck into his head and into the top of the left shoulder, and that his occupation of welding above his head increased and aggravated the discomfort.

The Curnutt case (No. 12,645 below).

Claimant Curnutt, who was injured on February 14, 1947, filed a claim on January 17, 1949. No compensation was paid. Medical reports introduced in evidence at the hearing indicate that Curnutt received a severe injury to his back which caused him pain and discomfort at all times. On the day of the accident he had just one hour to go before the job was finished, but the following day his pain was so severe that he was unable to work and he reported for medical treatment at intervals of twice a week for a period of two months. He was off for a period of about five days at that time, and after he returned to work he continued to notice a considerable amount of pain and discomfort in his back and was told by

the doctor that he "must not do heavy work". (CR. 34.) He was fitted with a low back support. (CR. 54.) He also testified at the hearing that in January, 1948 (within 1 year of the date of injury), his back was bothering him so much that he took off two weeks from his work. (CR. 34-35.)

The Shallat case (No. 12,646 below).

Claimant Shallat, who was injured on November 21, 1947, filed a claim on May 23, 1949. No temporary disability was incurred and no compensation was paid. (SR. 25.) At the hearing before petitioner Pillsbury claimant testified that "the left hand is still the same as it was when I got injured", and that he was suffering "terrific pains when I lift something. It goes right through me. It affects the whole hand, and lots of times I have to drop something. I cannot hold it with the left hand." (SR 27.)

The Manos case (No. 12,647 below).

Claimant Manos, who was injured on December 22, 1947, filed a claim on August 17, 1949. No compensation was paid. As found by the Deputy Commissioner, Manos received a definite and painful injury to his neck and head when he was struck on the head by an iron bar or saddle falling from above. Immediately after the accident, claimant was examined and X-rayed, and was given treatment right along by Dr. Stehr to whom he reported approximately every two weeks up to the date of the hearing. (MR. 27.) He was advised by the doctor not to do any welding but to try to get an easy job, and not to get up on

heights. His boss accommodated him in this type of work so he stayed on the job for a couple of months, at which time the whole yard was laid off. He then lost a week's time, and went to work for another employer. (MR. 28.) He got a job as a welder, which gave him a higher scale of pay than he was getting at the time of his accident. He worked for the second employer for about a year, but still made visits to Dr. Stehr on an average of once a week. (MR. 29.) Claimant continued to have the same symptoms as he experienced immediately following the accident, namely, that his neck "just clicks like crushing ice in there all the time, every move. It just crunches". That at first he noticed "just clicks" and that it then started developing more and more until at the time of the hearing there was a "real tight feeling as she comes as far as I can turn it to the right or left". (MR. 30.) When asked at the hearing when he first developed that condition, claimant testified "Right along, but just come not right at first, but since it started it continued getting worse and strong." (MR. 31.) The first time he reported to his employer to inquire about compensation was August 17, 1949, 1 year and 8 months after the injury. (MR. 32.)

The claimants in each of the cases suffered definite, specific injuries of which they were immediately aware and which caused immediate and continuing symptoms, and for which they sought and obtained immediate medical aid and all but claimant Shallat continued to receive medical treatment up to the time of the filing of their respective claims for compensa-

tion. Each claimant suffered disability in the sense that he was required to be under medical treatment.³

ARGUMENT.

I.

SECTION 13(a) OF THE LONGSHOREMEN'S AND HARBOR WORKERS' ACT BARS CLAIMS FOR COMPENSATION UNLESS FILED WITHIN ONE YEAR AFTER THE INJURY, AND IN THE CASES OF SPECIFIC KNOWN INJURIES THE PERIOD CANNOT BE EXTENDED.

The Longshoremen's and Harbor Workers' Compensation Act, Section 13(a), provides for a period of limitations within which claims for compensation can be filed. As heretofore pointed out, the significant portion of this section (33 U.S.C.A. 913 (a)) provides as follows: "The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury * * *". In petitioners' brief the word "injury" is emphasized and this Court is urged to approve the unfounded proposition that inasmuch as the congressional bill enacting this law originally used the word "accident" instead of "injury", the substitution of the latter term indicates that Congress intended that the time for filing a claim should begin to run from the date of "compensable injury", that is, where the injury results in disability beyond seven days. There

³Note that in none of the cases was there a so-called "latent" injury or condition. Each claimant suffered a definite painful injury which required continuous medical treatment. There was no recurrent or newly developed condition.

is no basis in fact or reason for the claim that Congress had any such alleged intention. It is clearly apparent that the word "injury" instead of "accident" was used because "injury" is a much broader term in the sense that many conditions may arise from injury which could not conceivably be the basis for a claim under the term "accident". This becomes at once obvious when reference is made to Section 2 of the Act (33 U.S.C.A. 902) which has to do with "definitions". Under subsection (2) thereof the term "injury" is defined as follows: "*The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.*" (Emphasis added.) The foregoing definition demonstrates why the word "injury" was used in Section 13(a) instead of "accident", for the term "accident" would not include "occupational disease or infection as arises naturally out of such employment", nor would it include "injury caused by the willful act of a third person".

The reasons asserted in petitioners' brief for the substitution of the word "injury" for "accident" in Section 13(a) of the Act cannot therefore be taken seriously. That being so, the related argument that injury means "compensable injury" (disability beyond seven days) must also fall. True, some of the

cases cited by petitioners go off on the ground that "compensable injury" was meant instead of "injury." It is hardly necessary to point out that had Congress intended to specify "injury" in that sense for the purpose of applying the statute of limitations it would have been a simple matter to have so designated the term, as has been done by some state legislative bodies in regard to state compensation acts.

It will be demonstrated below that the Court of Appeals for the Ninth Circuit has considered most carefully the very section involved, namely, 13(a) of the Longshoremen's and Harbor Workers' Compensation Act, and has held without equivocation that the language therein used is clear and unambiguous, and that in providing that a claim is barred unless filed within one year after the injury or within one year after the date of last payment of compensation, that the section means exactly what it says. This Court affirmed the lower court's opinion and denied a petition for rehearing.⁴

II.

IF ANY PROVISION OF THE LONGSHOREMEN'S ACT REQUIRES MODIFICATION, THIS CAN BE DONE ONLY THROUGH LEGISLATIVE AMENDMENT AND NOT BY JUDICIAL DECREE.

Many of the state compensation statutes, in addition to limitations of time for filing *original* claims,

⁴*Kobilkin v. Pillsbury*, 103 F. (2d) 667, affirmed, U.S. Supreme Court, 309 U.S. 619, rehearing denied, 309 U.S. 695.

provide specifically for the filing of claims for so-called "new and further disability". For example, California Labor Code Section 5405 provides that proceedings may be commenced for the collection of compensation benefits within one year from the date of injury or expiration of period covered by any payment of compensation, or the date of last furnishing of medical treatment.

In addition to these periods of limitation for the filing of original claims within the one year period, the California law prescribes a *five-year* period within which claims for "new and further disability" may be brought. See also Labor Code Section 5410, which reads as follows: "Nothing in this chapter shall bar the right of any injured employee to institute proceedings for the collection of compensation within five years after the date of the injury upon the ground that the original injury has caused new and further disability" * * *.

The foregoing demonstrates the obvious fact that for the situations in which "new and further disa-

⁵Section 22 of the Longshoremen's Act, 33 U.S.C.A. 922, provides for modification of awards as follows:

"Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. * * *."

bility" may arise at some later time after the original injury, provision can and has been made by *legislation*, not by "judicial amendment". If the Longshoremen's Act is inadequate in this respect it is surely not for the Courts to attempt to correct such omissions; only Congress can adopt new legislation or enact necessary amendments to the existing law.

III.

THE AUTHORITIES RELIED UPON BY PETITIONERS ARE CONCERNED WITH SO-CALLED LATENT INJURIES, WHEREAS THE PRESENT CASES INVOLVE SPECIFIC AND DEFINITE INJURIES OF WHICH THE CLAIMANTS WERE AT ALL TIMES FULLY AWARE.

The case of *Di Giorgio Fruit Corp. v. Norton*, 93 F. (2d) 119, certiorari denied, 302 U.S. 767 (cited by petitioners), involved a *latent* condition following an injury as the result of which the claimant suffered contusions and lacerations to the globe of his left eye when he was struck by a bunch of bananas. He was disabled for about one week and thereafter resumed his employment for approximately ten months, following which he was confined to prison for some eighteen months. During his confinement he felt symptoms in his eye and was treated by the prison authorities. After his release from prison he obtained further treatments and in August, 1936, approximately four years after the injury, he filed a claim under the Longshoremen's Act for compensation for permanent disability resulting from the loss of the sight of his eye. In the course of the hearings

before the Deputy Commissioner, claimant testified that the first time he noticed "anything serious the matter" with his eye was just a few weeks after the hearing. It was found that the injury to claimant's eye "was by its nature a progressive one" resulting from the injury and proceeding through various progressive stages of degeneration, culminating in a cataractous condition, and that the claimant "*became aware of this condition* in the month of August, 1936," four years after the injury, whereupon he immediately filed his claim. (Emphasis added.)

It is important to note the comments of the Court of Appeals in the *Di Giorgio* case, at page 120, as to whether the claimant's condition "should have been observable" by him "long prior to the time of the filing of his claim". The Court pointed out that one of the physicians testified that the condition might not have been observed by the claimant until August 1936. This discussion obviously concerns the question of whether the claimant was *unaware of his condition* and therefore excused from filing his claim within the prescribed one year period. The Court seemed to excuse a delay in the filing of the claim until the condition was "reasonably apparent."

The cases at bar of course are quite dissimilar, and each claimant here was under medical care and fully aware of his injury and continuing painful symptoms. We respectfully submit that if the holding of the Court of Appeals in the *Di Giorgio* case ever was good law it has been overruled by this Court in the

case of *Kobilkin v. Pittsury*, 103 F.(2d) 667, affirmed, U.S. Supreme Court, 309 U.S. 619, rehearing denied, 309 U.S. 695. (This opinion will be discussed fully below.).

Another case relied upon by petitioners is *Potomac Electric Power Co. v. Cardillo*, 107 F. (2d) 962. The claimant in that case was struck on the head by the metal end of an air hose. He was treated for a laceration and concussion in the emergency hospital for two days, and then returned to work without any further treatment or disability and continued working for approximately one and one-half years, from which time on he worked very little. About two years following his injury a psychiatrist informed claimant "that he was suffering from a progressive disease of the brain" caused by the said injury. Three months thereafter he filed a claim for compensation. The U.S. Court of Appeals for the District of Columbia held that the statute of limitation did not bar the claim, citing *Kropp v. Parker*, 8F Supp. 290, and the *Di Giorgio* case, supra. Here again, the *Kobilkin* case is controlling, and in any event, the facts differ from the present claims in that the claimant in the *Potomac* case, except for the two days following his injury, had no medical treatment. Furthermore, there were apparently no symptoms and the claimant was unaware of any condition resulting from the injury until approximately two years thereafter when he was examined and found to be suffering from "a progressive disease of the brain", following which he immediately filed a claim.

It is not true as claimed at page 10 of petitioner's brief that "The conflict of decisions among the circuits thus presented was left unresolved by this Court's later affirmance, without opinion and by an equally divided Court, of the *Kobilkin* decision". As we have pointed out, the cases which petitioners urge as authority for their tenuous position are based on latent conditions where the injured employees were not aware of the serious injuries and conditions suffered until some time after the statutory period. In the cases at bar, each of the claimants sustained specific injuries and each of them was under medical treatment and suffered painful symptoms from the date of their injuries up to the date of the filing of their respective claims.

One other decision is urged by petitioners, namely, *Great American Indemnity Co. v. Britton*, 179 F. (2d) 60, decided by the United States Court of Appeals for the District of Columbia Circuit, which it is claimed is in conflict with the holdings in the present cases. The situation is quite distinguishable. In the *Great American Indemnity* case a carpenter suffered an injury to his leg, the condition of which was erroneously diagnosed by a doctor as being "an illness (a thrombosis) in the leg rather than from an accidental injury". The injury occurred on March 11, 1946, but it was not until April 4, 1947, more than one year after the accident, when claimant was examined by an orthopedic specialist who found that the achilles tendon had been torn through its major part and that an operation was required. A formal

claim for compensation was filed on May 16, 1947. In holding that the claim was timely filed, the Court referred to the *Potomac Electra case*, *supra*, and held that since the claimant had been given improper medical advice to the effect that his condition was non-industrial he could not, "in good conscience" have filed a claim. The Court went on to say that

"Ignorance based on completely erroneous advice from a physician can be even more profound—and more dangerous in its consequences—than ignorance based on no advice at all. Such advice effectively prevents a conscientious employee, or a lawyer regardful of the standards of his profession, from filing a claim for an award, at least until different advice of equal or higher standing is received. We cannot place a premium on the filing of claims which fly in the face of professional advice and ethical standards. There is no suggestion here that claimant acted negligently or in bad faith. In no sense is this case one involving mere delay and laxness in the filing of a claim." 179 F. (2d) 60, 62.

It is of great significance to note that the Court in the *Great American Indemnity* case declared (p. 62) as follows:

"To be distinguished also is the situation in *Kobilkin v. Pillsbury*, 9 Cir., 103 F.(2d) 667, affirmed by an equally divided court, without opinion, 309 U.S. 619, 60 S.Ct. 465, 84 L.Ed. 983. The court there sustained the finding of the deputy commissioner that a claim, filed after one year had elapsed from the date when the injuries occurred, was not timely. In that case, not only

was the injury patent, but the employee at all times realized the causal connection between the accident and his subsequent suffering, the only unknown factors being the extent of the injury and the likelihood of recurrent suffering. No element of erroneous medical advice was present". (Emphasis supplied.)

It can hardly be said, therefore, that the *Kobilkin* case or the cases at bar are in conflict with the holding of the Court of Appeals in *Great American Indemnity v. Britton*, supra, which is a situation where the injured employee was not aware of the industrial character of his condition. In the *Kobilkin* case and in the cases at bar, the injured employees were fully aware of their injuries, were under medical care and suffered continuing painful symptoms.

The arguments urged in the present petition are based upon the same reasons urged heretofore, and which were considered and rejected by this Court on petition for certiorari and petition for rehearing in the *Kobilkin* case. This Court has already considered and decided the question here presented, which is no more "of substantial importance" now, than heretofore.

We respectfully submit that it is not true as claimed in Petitioners' Brief (pp. 10, 11) that "In holding that the period of limitations begins from the time of the accident instead of from the time the injury becomes compensable, the Court below held, in effect, that it begins to run before the cause of action accrues." For one thing, if an injured employee con-

tinues to suffer pain and discomfort for as long as a year from the date of his injury, his condition may well be *permanent*. In such case, he is put on notice by his prolonged and painful condition and he is authorized under the Act to file his claim for compensation. Section 19(a) (33 USCA 919(a)) by providing that "a claim for compensation may be filed at any time after the first seven days of disability following any injury * * *" does not prohibit a claimant from filing a claim until there has first been a period of seven days of temporary disability. There are many cases where the injuries do not cause temporary disability, but this has never resulted in barring the filing of claims for permanent disability.

One of the very claims before this Court, namely, that of Claimant Shallat is just such a case. To follow petitioners' argument to its logical conclusion, Shallat cannot maintain a claim because he has never incurred "the first seven days of disability".

As a matter of fact petitioners herein have long followed a practice of initiating and permitting the filing of claims by injured employees expressly to prevent the running of the statute of limitations. See Appendix B.

Indeed, Section 19(a) (33 USCA 919(a)) does not *prohibit* the filing of a claim until "after the first seven days of disability following injury". The Section merely says that "A claim for compensation *may* be filed * * * at any time after the first seven days of disability following any injury". As pointed

out, if this section were prohibitive against the filing of any claim unless there was first a period of seven days of disability, claimant Shallat and many other claimants in his position would never be able to file a claim. Such an absurd result was never intended by Congress.

The reference in the statute to the filing of a claim "any time after the first seven days of disability following any injury" obviously is in keeping with Section 6 (33 USCA 906) which provides that "no compensation may be allowed for first seven days of disability." In other words, since compensation for *temporary* disability could not possibly be awarded where injury causes temporary disability for seven days or less, there would be no basis for a claimant to perform the idle act of filing a claim for temporary disability in such case. However, if for example, the claimant were in need of medical treatment which the employer refused to furnish, even though no period of temporary disability were involved, the employee would still be entitled to file a claim for medical benefits. It is therefor abundantly clear that Section 19(a) (33 USCA 919(a)) was never intended to deny the right to file a claim excepting in those cases of disability in excess of seven days.

As we have said, the reasoning of the authorities relied upon by petitioners was based in each case upon special situations involving *latent* injuries and conditions. No such situation prevails in any of the cases at bar.

IV.

THE BACKGROUND, THEORY, AND PURPOSES OF STATUTES OF LIMITATION REQUIRE THE COURTS TO LOOK WITH FAVOR UPON SUCH STATUTES, AND TO CONSTRUCT THE LIMITATION LIBERALLY SO AS TO EFFECT THE INTENTION OF CONGRESS.

To adopt the contentions of petitioners would literally mean that there would be no statute of limitations whatsoever in any case where temporary disability did not extend beyond seven days, whereas in a case of injuries involving a disability period and payment of compensation beyond the waiting period, the claim would be barred by the one year statutory period.

A study of the origin and development of statutes of limitation indicates that while in the early development of this phase of the law such a defense was unpopular and was often circumvented by the courts, the wisdom and need for legislations of this nature is now fully acknowledged. We refer to the following significant commentary from 34 Am. Jur. 24:

"This hostility of the courts toward the limitation statutes seems to have been transplanted to this country as a part of the common law. In time, however, the legislative policy came to be recognized as controlling, and the duty of the Courts to give effect thereto to be fully recognized. The modern tendency is, although there are some cases which contain statements to the contrary, to look with favor upon the defense. Statutes of limitation are now considered as wise and beneficent in their purpose and tendency;

they are looked upon as statutes of repose, and are held to be rules of property vital to the welfare of society. Such statutes are deemed to be in the interest of morals, serving to prevent perjuries, frauds, and mistakes, and to render people attentive to the early adjustment of demands, and prevent the disturbance of settlements which have been made but of which the proof may have been lost. While the courts will not strain either the facts or the law in aid of a statute of limitations, nevertheless it is established that *such enactments will receive a liberal construction in furtherance of their manifest object, are entitled to the same respect as other statutes, and ought not to be explained away.*" (Emphasis added.)

See also *Fontana Land Co. v. Laughlin*, 199 Cal. 625 at page 636, wherein the Supreme Court of California held

"The power to nullify acts of the legislature prescribing a limitation upon the time within which actions may be commenced is not a judicial prerogative. Statutes of limitation have become rules of property. They are vital to the welfare of society and are favored by the law."

Again, in 34 Am. Jur. 41, it is stated that

"the courts are inclined to construe limitation laws liberally, so as to effect the intention of the legislature. Such statutes will be given the same effect as other enactments, and unless compelled to do so by the force of former decisions, *the courts will not give a strained construction in order to evade their effect.*" (Emphasis added.)

What petitioners are asking this Court to do is to read into the statute some exception not provided for in the law. As stated in 34 *Am. Jur.* 44:

"In view of the favorable light in which statutes of limitation are now regarded, their application usually may not be evaded by implied exceptions, or by the interpolation of new provisions. As a general rule, the enumeration by the legislature of specific exceptions by implication excludes all others, and * * * the courts ordinarily are without power to read into statutes, by construction, exceptions which have not been embodied therein."

We call the Court's attention specifically to the following statement contained in 34 *Am. Jur.* 151:

"It has been held that the courts in construing a special statute of limitation will not read another statute into it and thus incorporate exceptions not contained therein, or give it any new or unusual interpretation."

There could never be an end to litigation arising out of claims filed under the Longshoremen's Act if petitioners' contentions were to be adopted. There would be no time limit on when a claimant could revive an old, stale claim. Were the practice to become widespread, which in all likelihood would be the case, the offices of the various Deputy Commissioners would be called upon to hold hearings on large numbers of stale and unmeritorious claims, with the effect that the very thing petitioners complain about, namely, being deluged with more claims than they could handle, would surely be the result. It

would not be possible to close any claim, and the statute of limitations would become nonexistent, a situation which would plainly defeat the clearly expressed intentions of Congress.

Even the most liberal state workmen's compensation acts do not impose upon an employer unlimited liabilities forever.

V.

THE KOBILKIN CASE HOLDING THAT "ONE YEAR AFTER THE INJURY" MEANS EXACTLY THAT IS CONTROLLING

In 1939 this Honorable Court had occasion to consider the proper interpretation to be given to Section 13(a) of the Longshoremen's Act in the case of *Kobilkin v. Pillsbury*, 103 F. (2d) 667, affirmed, U. S. Supreme Court, 309 U.S. 619, rehearing denied, 309 U.S. 695. Petitioners attempt to distinguish this case, but we believe a careful analysis of the lower Court's opinion and discussion of the meaning of this Section of the Act will demonstrate beyond doubt that the language employed by Congress means just what it says.

The claimant in the *Kobilkin* case was injured on June 7, 1935 when he was struck on the left shoulder by a sack of sugar which had dropped from a sling load. It was found that he had sustained a bad bruise from which he was disabled for three weeks following the accident, during which time compensation was voluntarily paid to him. He continued to experience physical pain but suffered no further loss of wages

on account of the injury until January 9, 1937, on which date he became aware of severe pain in his shoulder and went to a doctor of his own choice who operated on his shoulder for excision of a sub-deltoid bursa. It was found at the operation that there was a separation of the bones of the shoulder. On March 3, 1937 a claim for compensation was filed. The Deputy Commissioner denied the claim on the ground that it had been filed more than one year from the date of last payment of compensation, and was therefore barred. The Court of Appeals analyzed the provisions of Section 13(a) of the Longshoremen's Act, 33 U.S.C.A. 913(a), and considered carefully not only the portion of the section dealing with claims barred because not filed within "one year after the date of last payment" of compensation, but also the provision in the section that the right to compensation "shall be barred unless a claim therefor is filed within one year after the injury". In that regard the law was declared to be as follows (103 F. (2d) 667, at 670):

"The terms 'injury' and 'disability', separately defined in the statute, are not synonymous. It has not been suggested that the injury from which appellant suffers is an occupational disease. Admittedly, it is an accidental injury arising in the course of employment. It was inflicted at the time of the accident, not when its full extent was first noted at the later time. The trauma in fact resulted in an immediate though temporary disability for which appellant was paid compensation. The circumstance that appellant again became disabled a year and a half

later, and the more serious nature of the injury was then for the first time recognized, does not change the situation. The claim was not filed until more than a year after the occurrence of the injury and more than a year after the last payment of compensation. Under the plain terms of Section 13(a) of the statute the claim is barred. If we turn to Section 22 and assume a change of condition we again encounter the statutory bar."

It is manifestly clear from the foregoing language that Court of Appeals recognized and considered the importance of the fact that the terms "injury" and "disability" are separately defined by the Act.⁶ Petitioners' argument that the word "injury" in Section 13(a) should be construed to mean "compensable injury" is contrary to the separate definitions for "injury" and "disability". Nor is there any rational basis for the argument made by petitioners in the court below that "injury" as used in the section under consideration means the date when a claimant "knows or has reason to know of the existence of his physical disability and its relation to the employment", or that "the time for filing claim does not begin to run until this awareness exists". (Page 33, Petitioners' Brief in court below.)

⁶ "The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment." Sec. 2 (2). " 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Sec. 2(10). (13 U.S.C.A. 902 (2), (10).)

In this respect we refer to the declaration of the Court of Appeals in the *Kobilkin* case (103 F. (2d) at 670) as follows:

"Admittedly, it is an accidental injury arising in the course of employment. *It was inflicted at the time of the accident, not when its full extent was first noted at the later time.*" (Emphasis added.)

We repeat, the same argument now made by petitioners in urging that Section 13(a) should have an interpretation different from the actual and clear wording thereof was indeed considered and rejected by this Court in affirming the lower court's pronouncement in the *Kobilkin* case (103 F. (2d) at 670) as follows:

"It was the manifest Congressional intent to deny compensation in all cases of disability arising from accidental injury unless claim is filed within the time limited. *No provision is made for exceptional cases. We agree that the act is to be liberally construed, but neither the deputy commisisoner nor the courts have the power to legislate; and nothing short of legislation would make relief possible in a case like this.* (Emphasis added.)

It is of utmost significance that Judge Mathews in a concurring opinion (103 F. (2d) at 671) declared emphatically that:

"As used in the Longshoremen's and Harbor Workers' Compensation Act (Section 13), the phrase 'one year after the injury' means just that. It does not mean one year after the claim-

ant's discovery of the true nature of the injury. The Act says nothing about discovery."

Judge Mathews' discussion was not confined to claims where compensation had been paid but also to claims where none had been paid. He stated very clearly that

"the phrase 'one year after the injury' means just that. It does not mean one year after the claimant's discovery of the true nature of the injury." (Emphasis added.)

A fair and accurate statement of the law, therefore, is, that where a specific trauma occurs, as distinguished from occupational disease, the injury is "inflicted at the time of the accident, not when its full extent" is first noted at some later time, and that the phrase in Section 13(a), "one year after the injury", means just that and it does not mean five or ten years, or an unlimited number of years, after the injury, as urged. The sheer absurdity of the position taken by petitioners is exemplified when it is broken down into the following categories:

(a) An injured workman who has suffered 8 days of disability and has received compensation for 1 day is barred from recovery of further compensation unless a claim is filed within one year.

(b) An injured workman who has suffered 7 days of disability and has received no compensation has forever within which time to file his claim.

(c) An injured workman (as in the case of Shallat herein) who claims to have incurred a

permanent disability, but has not suffered any temporary disability is barred from filing any claim until and unless he shall first sustain more than seven days of disability.

No such incongruous intention can be seriously imputed to Congress.

This Court's consideration and affirmance of the lower court's holding in the *Kobilikin* case, is the law of the land; consequently none of the cases cited by petitioners can be taken as an adequate basis for the granting of petitioner's application for certiorari. The *Kobilikin* case is controlling.

CONCLUSION.

From the foregoing, it is respectfully submitted that the petition for the writ of certiorari should be denied.

Dated, San Francisco, California,
September 10, 1951.

LYMAN HENRY,
Proctor for Respondents.

JOHN H. BEACK,
EDWARD R. KAY,
Of Counsel for Respondents.

(Appendices A and B Follow.)

Appendices A and B

Appendix A

The relevant provisions of the Longshoremen's and Harbor Workers' Compensation Act (c. 509, 44 Stat. 1424, 33 U. S. C., Secs. 901 *et seq.*) are as follows:

SEC. 2. When used in this Act—

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(11) "Death" as a basis for a right to compensation means only death resulting from an injury.

(12) "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this Act, and includes funeral benefits provided therein.

SEC. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any

dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

* * * * *

SEC. 4 (b). Compensation shall be payable irrespective of fault as a cause for the injury.

* * * * *

SEC. 6. (a) No compensation shall be allowed for the first seven days of the disability, except the benefits provided for in section 7: *Provided, however,* That in case the injury results in disability of more than forty-nine days, the compensation shall be allowed from the date of the disability.

* * * * *

SEC. 7. (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for such period as the nature of the injury or the process of recovery may require. * * *

* * * * *

SEC. 8. Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent $66\frac{2}{3}$ per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

(b) Temporary total disability: In case of disability total in character but temporary in quality $66\frac{2}{3}$ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(c) Permanent partial disability: In case of disability partial in character but permanent in quality, the compensation shall be $66\frac{2}{3}$ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section respectively, and shall be paid to the employee, as follows:

* * * * *

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

(19) Partial loss or partial loss of use: Compensation for permanent partial loss of use of a member may be for proportionate loss or loss of use of the member.

(20) Disfigurement: The deputy commissioner shall award proper and equitable compensation for serious facial or head disfigurement, not to exceed \$3,500.

(21) Other cases: In all other cases in this class of disability the compensation shall be $66\frac{2}{3}$ per centum of the difference between his average weekly wages and his wage earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest.

(22) In any case in which there shall be a loss of, or loss of use of, more than one member or parts of more than one member set forth in paragraphs (1) to (19) of this subdivision, not amounting to permanent total disability, the award of compensation shall be for the loss of, or loss of use of, each such member or part thereof, which awards shall run consecutively, except that where the injury affects only two or more digits of the same hand or foot, paragraph (17) of this subdivision shall apply.

* * * * *

(e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

(f) Injury increasing disability: (1) If an employee receive an injury which of itself would only cause permanent partial disability, but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury: *Provided, however,* That in addition to compensation for such permanent partial disability, and after the cessation of the payments for the prescribed period of weeks, the employee shall be paid the remainder of the compensation that would be due for permanent total disability. Such additional compensation shall be paid out of the special fund established in section 44 [33 U. S. Code 944].

* * * * *

APPENDIX B-1

United States of America
UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

IN THE MATTER OF THE CLAIM FOR COMPENSATION
UNDER THE LONGSHOREMEN'S AND HARBOR
WORKERS' COMPENSATION ACT.

WILLIAM FASANO,

against

Claimant.

MATSON TERMINALS, INC.,

Employer.

FIRMIN'S FUND INSURANCE CO.,

Carrier.

Case No. 716-107
Claim No. 2614
NOTICE OF HEARING
Injury of 9-29-45

(1) To Mr. William Fasano,
1645 Leavenworth St.,
San Francisco, Calif.

(2) To Matson Terminals, Inc.,
Attn: Mr. E. J. Kelly,
To 215 Market St.,
San Francisco, Calif.

To

To

You are hereby notified that upon application made by claimant

an interested party in the above-entitled
claim, a hearing on such claim is hereby ordered, to be held before WARREN H. PILLSHURY

Deputy Commissioner 19th Compensation District of the United States Employees' Com-
pensation Commission, at ROOM 318, 417 MARKET STREET,

in the City of SAN FRANCISCO, CALIFORNIA, on the MONDAY, the 17th
day of JUNE, 1946, at 10 o'clock a. m. of that day.

ES-203, employee's claim for compensation filed to stop the running of the
Statute of Limitations.
(SEE ATTACHED LETTER)

In testimony whereof, the undersigned, a Deputy Commissioner of the
United States Employees' Compensation Commission, has hereunto

set his hand at San Francisco, California,

this 5th day of June, 19 46

Warren H. Pillsbury
Deputy Commissioner.

19th Compensation District.

Case No. 716-409

United States Employees' Compensation Commission.
Office of Deputy Commissioner Warren H. Pillsbury.
Administering Longshoremen's and Harbor Workers'
Compensation Act.

June 5, 1946

**NOTICE TO EMPLOYER AND INSURANCE
CARRIER THAT CLAIM HAS BEEN FILED.**

Gentlemen:

There is enclosed copy of a claim for compensation which has been filed by claimant, William Fazande. You should proceed to pay compensation promptly when due as provided by Section 14 of the Longshoremen's and Harbor Workers' Compensation Act, and to furnish medical treatment in accordance with Section 7(a) thereof, unless liability to pay compensation is controverted.

Section 14(d) provides that if the employer controverts the right to compensation he shall file with the deputy commissioner, on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

Under the Commission's regulations where claim is filed the employer or insurance carrier, within 10 days from the date notice is received that claim has been filed, is required to file answer thereto.

Answer is enclosed for use in the event the right to compensation is controverted and the claim is to be opposed.

The original notice and answer should be filed with the deputy commissioner at the above address and copy thereof served upon the claimant either personally or by mailing it to the address given in the claim if you deny liability, otherwise you should proceed to pay compensation immediately as provided by the said Act and not require the claimant, as well as yourself, needlessly to incur the expenses incidental to a hearing before the deputy commissioner.

Very truly yours,

WARREN H. PILLSBURY,

Deputy Commissioner.

pr

Case No. 716-409

EMPLOYEE'S CLAIM FOR COMPENSATION.

1. Name of employee: William Fazande.

9. Employer: Matson Terminals, Inc.

14. Date of accident or first illness, the 29th day of May, 1945.

15. How did accident happen or how was occupational disease caused? Stepped off end of ladder into hatch, and fell, landing on a shovel.

16. State fully nature of injury or occupational disease: Torn muscles and ligaments in chest.

Signed by William Fazande,

Claimant.

APPENDIX B-2
United States of America

FEDERAL SECURITY AGENCY, BUREAU OF EMPLOYEES' COMPENSATION

	J. H. B.	
	E. R. K.	
	H. W. S.	
	J. A. G.	
	R. L. F.	
	R. C. T.	
	M. J. M.	

IN THE MATTER OF THE CLAIM FOR COMPENSATION
UNDER THE LONGSHOREMEN'S AND HARBOR
WORKERS' COMPENSATION ACT.

FRED W. HOOPER,

against

Claimant.

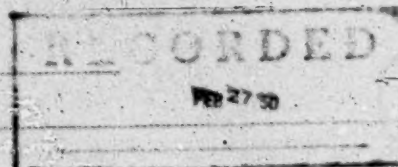
MATSON NAVIGATION COMPANY,

Employer.

FIREMAN'S FUND INSURANCE COMPANY,

Carrier.

Case No. **1-3452**
Claim No. **3779**
NOTICE OF HEARING
Injury of **12-12-48**



- (R) To **Mr. Fred W. Hooper**
2321 Van Ness Avenue
San Francisco, California
- (R) To **Matson Navigation Co.,**
215 Market St.,
San Francisco, California
- (R) To **Fireman's Fund Insurance Co.,**
Attn: Mr. E. R. Kay, Attorney at Law
233 Sausage Street
San Francisco, California

You are hereby notified that upon application made by claimant

_____ an interested party in the above-entitled
claim, a hearing on such claim is hereby ordered, to be held before **WARREN H. PILLSBURY**

Deputy Commissioner **13** Compensation District of the Federal Security Agency, Bu-
reau of Employees' Compensation, at **ROOM 124, 630 SANSOME STREET,**
in the City of **SAN FRANCISCO, CALIFORNIA,** on **FRIDAY, the 10th**
day of **MARCH**, 19**50**, at **10** o'clock **a**. m. of that day.

US-203, employee's claim for compensation, filed to protect the running of the
Statute of Limitations.

SEE ATTACHED LISTING

In testimony whereof, the undersigned, a Deputy Commissioner of the
Federal Security Agency, Bureau of Employees' Compensation, has

hereunto set his hand at **San Francisco, California**

this **24th** day of **February**

Warren H. Pillsbury

1950

Deputy Commissioner.
Compensation District.

Case No. 1-3452

Office of Deputy Commissioner Warren H. Pillsbury.
Administering Longshoremen's and Harbor Workers'
Compensation Act.

February 24, 1950

**NOTICE TO EMPLOYER AND INSURANCE
CARRIER THAT CLAIM HAS BEEN FILED.**
Gentlemen:

There is enclosed copy of a claim for compensation which has been filed by claimant, Fred W. Hooper. You should proceed to pay compensation promptly when due as provided by Section 14 of the Longshoremen's and Harbor Workers' Compensation Act, and to furnish medical treatment in accordance with Section 7(a) thereof, unless liability to pay compensation is controverted.

Section 14(d) provides that if the employer controverts the right to compensation he shall file with the deputy commissioner, on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

Under the Bureau's regulations where claim is filed the employer or insurance carrier, within 10 days from the date notice is received that claim has been filed, is required to file answer thereto.

Answer is enclosed for use in the event the right to compensation is controverted and the claim is to be opposed.

The original notice and answer should be filed with the deputy commissioner at the above address and copy thereof served upon the claimant either personally or by mailing it to the address given in the claim if you deny liability, otherwise you should proceed to pay compensation immediately as provided by the said Act and not require the claimant, as well as yourself, needlessly to incur the expenses incidental to a hearing before the deputy commissioner.

Very truly yours,

WARREN H. PILLSBURY,
Deputy Commissioner.

Federal Security Agency
Bureau of Employees' Compensation

Warren H. Pillsbury, Deputy Commissioner
Thirteenth District

Room 126, Appraisers Building
630 Sansome Street
San Francisco 11, California

pr

Case No. 1-3452

EMPLOYEE'S CLAIM FOR COMPENSATION.

1. Name of employee: Fred W. Hooper.

9. Employer: Matson Navigation Company.

14. Date of accident or first illness, the 12th day of December, 1948, at o'clock, A.M.

15. How did accident happen or how was occupational disease caused? Caught right foot in control gear, water tight door, maneuvering platform, engine room.

16. State fully nature of injury or occupational disease: Contusion right foot.

Signed by Fred W. Hooper,
Claimant.

**Federal Security Agency
Bureau of Employees' Compensation
Longshoremen's and Harbor Workers'
Compensation Act
Thirteenth Compensation District
Room 126, 630 Sansome Street
San Francisco 11, California**

**Address Replies to:
Refer to File No.
The Deputy Commissioner**

February 24, 1950

**Mr. Fred W. Hooper
2521 Van Ness Avenue
San Francisco,
California**

**Matson Navigation Co.,
215 Market Street
San Francisco,
California**

**Fireman's Fund Insurance Co.,
Attn: Mr. E. R. Kay, Attorney at Law
233 Sansome Street
San Francisco,
California**

**Re: Fred W. Hooper, 1-3452
Matson Navigation Company
Injury of 12-12-48.**

Gentlemen:

**Please be advised that the hearing in the above case
now set for Friday, March 10th, 1950, at 10:00 a.m.,**

at Room 126, 630 Sansome Street, San Francisco, California, *has been postponed indefinitely* pending return of injured person to port and surgery as recommended.

Yours very truly,

WARREN H. PILLSBURY

Warren H. Pillsbury
Deputy Commissioner
13th Compensation District

pr

United States of America

U. S. DEPARTMENT OF LABOR, BUREAU OF EMPLOYEES' COMPENSATION

J	H	B
E	R	K
F	L	N
J	A	G
R	J	J
K	C	I
M	I	M

IN THE MATTER OF THE CLAIM FOR COMPENSATION
UNDER THE LONGSHOREMEN'S AND HARBOR
WORKERS' COMPENSATION ACT.

William T. Crawford

against

Claimant.

United Engineering Company

Employer.

Fireman's Fund Ins. Co.

Carrier.

Case No. 1346-1049

PREHEARING CONF. OR

NOTICE OF HEARING

CL-3547

Dat: 9/16/47

To Mr. William T. Crawford, 1153 Divisadero Street, San Francisco, California

To: United Engineering Company, 215 Market Street, San Francisco, California

To Fireman's Fund Insurance Company, c/o Mr. Gaughran, Attorney, 233 Sansome Street
San Francisco, California

To Mr. Henry C. Sanford, Attorneys, 714 Hobart Building, San Francisco 4, Calif.

To

To

You are hereby notified that upon application made by William T. Crawford

an interested party in the above-entitled
claim, a hearing on such claim is hereby ordered, to be held before Warren H. Pillsbury

Deputy Commissioner 13th Compensation District of the U. S. Department of Labor, Bu-
reau of Employees' Compensation, at Room 126, 630 Sansome Street

in the City of San Francisco, California on FRIDAY, 30th
day of March, 19 51, at 9:00 o'clock a. m. of that day.

This prehearing conference or hearing is set on the initiative of the
Deputy Commissioner

PLEASE NOTE: Statute of limitations may run March 30, 1951.

Calendar
Filed
Acc Reporter
Reporter
sep

In testimony whereof, the undersigned, a Deputy Commissioner of the
U. S. Department of Labor, Bureau of Employees' Compensation, has

hereunto set his hand at San Francisco, California

this 21st day of March, 19 51

13th

Deputy Commissioner.
Compensation District.

Case No. 1366-1049

EMPLOYEE'S CLAIM FOR COMPENSATION.

1. Name of employee: Wm. H. T. Crawford.

9. Employer: United Engineering Co.

14. Date of accident or first illness, the 16th day of Sept., 1947, at 10 o'clock, A. M.

15. How did accident happen or how was occupational disease caused? Fell from main deck into engine room and injured back.

16. State fully nature of injury or occupational disease: Injury to back.

Signed by Wm. H. T. Crawford,
Claimant.

United States of America

U. S. DEPARTMENT OF LABOR, BUREAU OF EMPLOYEES' COMPENSATION

IN THE MATTER OF THE CLAIM FOR COMPENSATION
UNDER THE LONGSHOREMEN'S AND HARBOR
WORKERS' COMPENSATION ACT.

Jess I. Armenta

against

Claimant.

Arrow Stevedore Company

Employer.

Firman's Fund Insurance Company

Carrier.

Case No. 2201-100

NOTICE OF HEARING

Inf. 8/28/50

CI-3650

To Mr. Jess I. Armenta, 235 N. Johnson Street, Compton, California

To Arrow Stevedore Company, North 179, Wilmington, California

To Firman's Fund Insurance Company, Citizens Bank Building, Attention: Mr.
Murray H. Roberts, Attorney, Wilmington, California

To Firman's Fund Insurance Company, 233 Sansome Street, San Francisco, California

To Mr. Joseph London, Vice Pres., ILMU, Local 13, 234 Broad Avenue,
Wilmington, California

To

You are hereby notified that upon application made by Jess I. Armenta

an interested party in the above-entitled

claim, a hearing on such claim is hereby ordered, to be held before Warren H. Pillsbury

Deputy Commissioner 13th Compensation District of the U. S. Department of Labor, Bu-
reau of Employees' Compensation, 3000 CONVENT STREET, LONG BEACH, CALIFORNIA

in the City of WILMINGTON, CALIFORNIA on the TWENTY, 19th
day of SEPTEMBER, 1951, 10:30 o'clock, a.m. of that day.

US-209, US-215, US-215A served on the parties with this notice

see SEE ATTACHED LETTER POSTDATING HEARING

Calendar
Filed
Copy

In testimony whereof, the undersigned, a Deputy Commissioner of the
U. S. Department of Labor, Bureau of Employees' Compensation, has

hereunto set his hand at San Francisco, California

this 29th day of August, 1951

Warren H. Pillsbury
Deputy Commissioner.
Compensation District.

U. S. Department of Labor
Bureau of Employees' Compensation
Longshoremen's and Harbor Workers'
Compensation Act
Thirteenth Compensation District
Room 126, 630 Sansome Street
San Francisco 11, California

Address Replies to:
The Deputy Commissioner

Refer to File No.

August 29, 1951

Mr. Jess I. Armenta
235 E. Johnson Street
Compton, California

Arrow Stevedore Company
Berth 179
Wilmington, California

Fireman's Fund Insurance Company
Citizens Bank Building
Wilmington, California

Attention: Mr. Murray H. Roberts, Attorney

Fireman's Fund Insurance Company
233 Sansome Street
San Francisco, California

Mr. Joseph London, Vice President
ILWU, Local 13
234 Broad Avenue
Wilmington, California

Re: Jess I. Armenta, 2201-180
Arrow Stevedore Company
Inj: 8/28/50

Gentlemen:

Please be advised that the hearing now set for Tuesday, September 18, 1951, at 10:30 A.M. at the Conference Room, Longshoremen's Dispatching Hall, Wilmington, California, *has been postponed indefinitely.* Parties need not appear.

Yours very truly,

WARREN H. PILLSBURY

Warren H. Pillsbury
Deputy Commissioner
13th Compensation District

WHP:eep:sh

APPENDIX B-5
United States of America

FEDERAL SECURITY AGENCY, BUREAU OF EMPLOYEES' COMPENSATION

FEDERAL SECURITY AGENCY
BUREAU OF EMPLOYEES' COMPENSATION
Warren H. Pillsbury, Deputy Commissioner
Thirteenth District
Room 126, Appraisers Building
630 Sansome Street
San Francisco 11, California

IN THE MATTER OF THE CLAIM FOR COMPENSATION
UNDER THE LONGSHOREMEN'S AND HARBOR
WORKERS' COMPENSATION ACT.

LEE BRADA,

against

Claimant.

ARROW STEVEDORE COMPANY,

Employer.

FIREMAN'S FUND INSURANCE CO.,

Carrier.

Case No. **2201-120**

Claim No. **3399**

NOTICE OF HEARING

Injury of 4-10-49

(A) To **Mr. Lee Brada**
2781 Bush St.,
San Francisco, California

Mr. Julius Stern
ILWU., Local #10
Pier 15 North
San Francisco, California

(B) To **Arrow Stevedoring Co.,**
310 Sansome Street
To **San Francisco, California**

(C) To **Fireman's Fund Insurance Co.,**
Attn: **Mr. E. R. Kay, Attorney at Law**
To **233 Sansome St.,**
San Francisco, California

You are hereby notified that upon application made by **claimant**

an interested party in the above-entitled

claim, a hearing on such claim is hereby ordered, to be held before **WARREN H. PILLSBURY**

Deputy Commissioner **13th** Compensation District of the Federal Security Agency, Bu-
reau of Employees' Compensation, at **ROOM 126, 630 SANSOME STREET,**

in the City of **SAN FRANCISCO, CALIFORNIA,** on **THURSDAY, 1st**
day of **MAY**, 19**50**, at **10:00** o'clock **a**. m. of that day.

Purpose: **US-203, employee's claim for compensation, filed to protect the running of**
the Statute of Limitations.

(SEE ATTACHED LISTING)

In testimony whereof, the undersigned, a Deputy Commissioner of the
Federal Security Agency, Bureau of Employees' Compensation, has

hereunto set his hand at **San Francisco, California,**

this **1st** day of **MAY**, 19**50**

Calendar
Reporter
pr

Warren H. Pillsbury
Deputy Commissioner,
13th Compensation District.

Office of Deputy Commissioner Warren H. Pillsbury.
Administering Longshoremen's and Harbor Workers'
Compensation Act.

May 8, 1950

NOTICE TO EMPLOYER AND INSURANCE
CARRIER THAT CLAIM HAS BEEN FILED.
Gentlemen:

There is enclosed copy of a claim for compensation which has been filed by claimant, Lee Breda. You should proceed to pay compensation promptly when due as provided by Section 14 of the Longshoremen's and Harbor Workers' Compensation Act, and to furnish medical treatment in accordance with Section 7(a) thereof, unless liability to pay compensation is controverted.

Section 14(d) provides that if the employer controverts the right to compensation he shall file with the deputy commissioner, on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

Under the Bureau's regulations where claim is filed the employer or insurance carrier, within 10 days from the date notice is received that claim has been filed, is required to file answer thereto.

Answer is enclosed for use in the event the right to compensation is controverted and the claim is to be opposed.

The original notice and answer should be filed with the deputy commissioner at the above address and copy thereof served upon the claimant either personally or by mailing it to the address given in the claim if you deny liability, otherwise you should proceed to pay compensation immediately as provided by the said Act and not require the claimant, as well as yourself, needlessly to incur the expenses incidental to a hearing before the deputy commissioner.

Very truly yours,

WARREN H. PILLSBURY,

Deputy Commissioner.

Federal Security Agency

Bureau of Employees' Compensation
Warren H. Pillsbury, Deputy Commissioner
Thirteenth District

Room 126, Appraisers Building
630 Sansome Street
San Francisco 11, California

pr

EMPLOYEE'S CLAIM FOR COMPENSATION.

1. Name of employee: Lee D. Breda.

9. Employer: Arrow Stevedoring Company.

14. Date of accident or first illness, the 10th day of April, 1949, at 8 o'clock P. M.

15. How did accident happen or how was occupational disease caused? While placing roller beams in the shelter deck, I became over balanced and fell in the hatch.

16. State fully nature of injury or occupational disease: Injury to both ankles and right knee.

Signed by Lee Breda,

Claimant.

**Federal Security Agency
Bureau of Employees' Compensation
Longshoremen's and Harbor Workers'
• Compensation Act
Thirteenth Compensation District
Room 126, 630 Sansome Street
San Francisco 11, California**

**Address Replies to:
The Deputy Commissioner
Refer to File No.**

May 8, 1950

**Mr. Lee Breda
2781 Bush Street
San Francisco, California**

**Arrow Stevedore Co.,
310 Sansome Street
San Francisco, California**

**Fireman's Fund Insurance Co.,
Attn: Mr. E. R. Kay, Attorney at Law
233 Sansome St.,
San Francisco, California**

Mr. Julius Stern
ILWU, Local 10
Pier 18 North
San Francisco, California

Re: Lee Breda, 2201-120
Arrow Stevedoring Company
Injury of 4-10-49

Gentlemen:

Please be advised that the hearing in the above case now set for Thursday, May 18th, 1950 at 10:00 a.m., at Room 126, 630 Sansome Street, San Francisco, California, *has been postponed indefinitely.*

Yours very truly,

WARREN H. PILLSBURY

Warren H. Pillsbury
Deputy Commissioner
13th Compensation District

pr

APPENDIX B-6

United States of America

U. S. DEPARTMENT OF LABOR, BUREAU OF EMPLOYEES' COMPENSATION

IN THE MATTER OF THE CLAIM FOR COMPENSATION
UNDER THE LONGSHOREMEN'S AND HARBOR
WORKERS' COMPENSATION ACT.

John B. Page

against

Claimant.

Jones Stevedoring Co.

Employer.

Fireman's Fund Ins. Co.

Carrier.

Case No. 195-432

el-3621

NOTICE OF HEARING

Inj: 9/16/50

To Mr. John B. Page, 1103 Orinaba, Long Beach, California

THE Jones Stevedoring Company, Pier 4, Berth 3, Long Beach, California

To Fireman's Fund Insurance Company, Citizens Bank Building, Attention: Mr. Murray H. Roberts, Attorney, Wilmington, California

To Fireman's Fund Insurance Company, 233 Sansome Street, San Francisco, Calif.

To Mr. Joseph Longan, Vice President, 1130, Level 13, 234 Broad Avenue, Wilmington, California

To

You are hereby notified that upon application made by John B. Page

, an interested party in the above-entitled

claim, a hearing on such claim is hereby ordered, to be held before Warren H. Pillsbury

Deputy Commissioner 13th Compensation District of the U. S. Department of Labor, Bu-

reau of Employees' Compensation, at The conference room, Longshoremen's Dispatching Hall, 2343 BROAD AVENUE, WILMINGTON, CALIFORNIA

in the City of on Tuesday, 7th

day of August, 1951, at 10:00 o'clock a. m. of that day.

U.S. 203, U. S. 213, and 35-2154 served on the parties with this notice.

As attached letter explaining Formal claim filed to toll the statute of limitations.

In testimony whereof, the undersigned, a Deputy Commissioner of the U. S. Department of Labor, Bureau of Employees' Compensation, has

hereunto set his hand at San Francisco, California

this 23rd day of July, 1951

Warren H. Pillsbury

Deputy Commissioner.

13th Compensation District.

Calendar
Filed
esp

**Federal Security Agency
Bureau of Employees' Compensation
Longshoremen's and Harbor Workers'
Compensation Act
Thirteenth Compensation District
Room 126, 630 Sansome Street
San Francisco 11, California**

**Address Replies to:
The Deputy Commissioner
Refer to File No.**

July 23, 1951

**Mr. John.B. Page
1103 Orizaba
Long Beach, California**

**Jones Stevedoring Company
Pier A, Berth 5
Long Beach, California**

**Firemen's Fund Insurance Company
Citizens Bank Building
Attention: Mr. Murray H. Roberts, Attorney
Wilmington, California**

**Firemen's Fund Insurance Company
233 Sansome Street
San Francisco, California**

**Mr. Joseph London, Vice President
ILWU, Local 13, 234 Broad Avenue
Wilmington, California**

Re: John B. Page, 195-452

Jones Stevedoring Co.

Inj: 9/16/50

Gentlemen:

Please be advised that the hearing now set for Tuesday, August 7, 1951 at 10:00 A.M. at The Conference Room, Longshoremen's Ditpatching Hall, #343 Broad Avenue, Wilmington, California, *has been postponed indefinitely*. Parties need not appear.

Yours very truly,

WARREN H. PILLSBURY

Warren H. Pillsbury

Deputy Commissioner

13th Compensation District

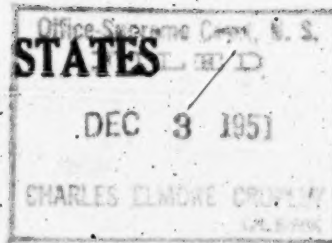
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BRIEF for RESPOND- ENTS

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 229



WARREN H. PILLSBURY, Deputy Commissioner
for The Thirteenth Compensation District,
Under The Longshoremen's and Harbor
Workers' Compensation Act, *Petitioner,*

vs.

UNITED ENGINEERING COMPANY, a Corporation,
and FIREMAN'S FUND INSURANCE COMPANY,
a Corporation, *Respondents.*

WARREN H. PILLSBURY, Deputy Commissioner
for The Thirteenth Compensation District,
Under The Longshoremen's and Harbor
Workers' Compensation Act, *Petitioner,*

vs.

UNITED ENGINEERING COMPANY, a Corporation,
and FIREMAN'S FUND INSURANCE COMPANY,
a Corporation, *Respondents.*

WARREN H. PILLSBURY, Deputy Commissioner
for The Thirteenth Compensation District,
Under The Longshoremen's and Harbor
Workers' Compensation Act, *Petitioner,*

vs.

MATSON TERMINALS, INC., a Corporation, and
FIREMAN'S FUND INSURANCE COMPANY, a
Corporation, *Respondents.*

ALBERT J. CYR, Deputy Commissioner for The
Thirteenth Compensation District, Under The
Longshoremen's and Harbor Workers' Com-
pensation Act, *Petitioner,*

vs.

UNITED ENGINEERING COMPANY, a Corporation,
and FIREMAN'S FUND INSURANCE COMPANY,
a Corporation, *Respondents.*

BRIEF FOR RESPONDENTS.

LYMAN HENRY,

351 California Street, San Francisco 4, California,

Proctor for Respondents.

JOHN H. BLACK,

EDWARD R. KAY,

233 Sansome Street, San Francisco 4, California,

Of Counsel for Respondents.

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a Corporation, *Respondents.*

BRIEF FOR RESPONDENTS.

OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of California, Southern Division (IR. 15; IIR. 15; IIIR. 14; IVR. 15)¹ is reported at 93 F. Supp. 898². The opinion of the United States Court of Appeals for the Ninth Circuit (IR. 44; IIR. 70; IIIR. 42; IVR. 56) is reported at 187 F. (2d) 987.

JURISDICTION.

The judgments of the Court of Appeals were entered on March 14, 1951. (IR. 48; IIR. 74; IIIR. 46; IVR. 60.) By order of Mr. Justice Black dated June 7, 1951, the time for applying for certiorari was extended to and including August 11, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED.

Whether the one-year period of limitation upon the filing of claims for compensation, as clearly defined by Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act, can properly be interpreted by judicial decree to mean that it

¹We shall employ designations IR, IIR, IIIR, and IVR in reference to Volumes I, II, III, and IV respectively of the Transcript of Record.

²Because of the existence of a question of law common to each of the four cases, they were consolidated both for trial and on appeal, and all four cases were dealt with in single opinions both in the District Court and in the Court of Appeals.

shall commence from the date disability results rather than from the date of injury.

STATUTE INVOLVED.

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. 901 et seq., are set out in the Appendix A.

The material provisions of Section 13(a) of said Act, 33 U. S. C. 913(a), are as follows:

"The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury * * * except that if payment of compensation has been made without an award on account of such injury * * * a claim may be filed within one year after the date of the last payment * * *"

STATEMENT OF THE CASE.

We shall refer briefly to certain material and important facts in each of the consolidated cases which were not included in petitioners' statement of the case.

The Johnson case.

Claimant Johnson, who was injured on May 28, 1947, filed a claim on January 17, 1949. No compensation was paid. At the hearing held before appellant Deputy Commissioner he testified that on

March 15, 1948 he suffered a reduction in pay by reason of having been "lowered from leaderman to welder" at which time claimant, "was told by Dr. Dixon and Dr. Holcomb, both, not to use a heavy * * *." (IR. 28.) It was after that, namely, May 15, 1948, that a change occurred in ownership of the employing firm, at which time claimant was assigned to work on boats which he could not do, and as a result was laid off. (IR. 29.) Medical reports introduced in evidence (IR. 33-35) indicate claimant had suffered considerable and continuing injury to his neck and that claimant's condition was such that he was unable to sleep, that he had pain extending from the base of his neck into his head and into the top of the left shoulder, and that his occupation of welding above his head increased and aggravated the discomfort.

We consider it of the utmost importance that petitioner Pillsbury in his findings of fact of March 17, 1949 found, among other things as follows:

That on May 12, 1947 claimant Johnson "sustained personal *injury* arising out of and in the course of his employment with the employer herein and resulting in *disability* as follows: While going up a ladder he bumped his head and neck on a cross-beam, sustaining extensive strain of the muscles of the neck which still continue painful; that defendants pleaded at the first hearing that the claim was barred by the period of limitations prescribed by said Act; that the claim was filed on January 17, 1949; that Employer's First Report of Injury was filed on May

28th, 1947; that the employer continued claimant in lighter work in a partially disabled condition without reduction in wages because of such physical impairment until it disposed of its ship-repair plant on May 15, 1948; that by reason of such provision of lighter work claimant did not lose time from work as a result of his injury until about June 15, 1948; that defendants have furnished claimant with medical treatment throughout; * * *." (IR. 6-7.) (Emphasis supplied.)

The Curnutt case.

Claimant Curnutt, who was injured on February 14, 1947, filed a claim on January 17, 1949. No compensation was paid. Medical reports introduced in evidence at the hearing indicate that Curnutt received a severe injury to his back which caused him pain and discomfort at all times. On the day of the accident he had just one hour to go before the job was finished, but the following day his pain was so severe that he was unable to work and he reported for medical treatment at intervals of twice a week for a period of two months. He was off for a period of about five days at that time, and after he returned to work he continued to notice a considerable amount of pain and discomfort in his back and was told by the doctor that he "must not do heavy work." (IIR. 34.) He was fitted with a low back support. (IIR. 54.) He also testified at the hearing that in January, 1948, (within 1 year of the date of injury), his back was bothering him so much that he took off two weeks from his work. (IIR. 34-35.)

Petitioner Pillsbury's Compensation Order of April 8, 1949 provides among Findings of Fact the following: That on February 18, 1947 Claimant Currutt

"sustained personal *injury* arising out of and in the course of his employment and resulting in *disability* as follows: while lifting a heavy object, he wrenched his back; that defendants at the first and only hearing herein asserted the contention that the claim was barred by the period of limitations described by said act; that no compensation has been paid for said injury; that the claim for compensation was filed herein on January 17, 1949, that the employer submitted to the Deputy Commissioner its first report of injury in this matter on or about March 8th, 1947; that claimant was continued in lighter work and full wages by the employer after a disability and loss of working time of six days, until his employment was terminated on January 13, 1948, and that claimant did not lose wages in excess of seven days as a result of his injury until February 5th, 1948, that the employer had knowledge at intervals throughout the entire period from February 18, 1947, to the present time that claimant was suffering distress as a result of said injury, and that the employer provided medical treatment for him therefor during said period, * * *"
(IIR. 5-7.)

The Shallat case.

Claimant Shallat, who was injured on November 21, 1947, filed a claim on May 23, 1949. No temporary disability was incurred and no compensation was paid. (IIIR. 25.) At the hearing before petitioner

Pillsbury claimant testified that "the left hand is still the same as it was when I got injured," and that he was suffering "terrific pains when I lift something. It goes right through me. It affects the whole hand, and lots of times I have to drop something, I cannot hold it with the left hand." (IIIR. 27.)

Petitioner Pillsbury, in his compensation order of July 28, 1949³ included among his findings of fact the following: That claimant Shallat on November 21, 1947

"sustained personal *injury* arising out of and in the course of his employment and resulting in *disability* as follows: He caught his left hand between a sling and a bight, causing a contusion of the left hand and exacerbation of a pre-existing progressive arthritis of the proximal joint of the second or middle finger; that the employer furnished claimant with medical treatment, etc., in accordance with Section 7(a) of the said Act; * * * that claimant did not sustain at said time any sufficient injury to the right hand to be a cause of any disability therein; that no compensation has been paid; that the claim for compensation was filed on May 23rd, 1949, the employer's first report was filed in the office of the Deputy Commission on February 16th, 1948 * * *." (TR. pp. 5 and 6, U. S. Court of Appeals No. 12,646. See Appendix C.)

³Through an apparent error in printing Vol. III of the Transcript of Record before the Supreme Court at page 5 thereof incorporates the Deputy Commissioner's award for claimant Howard Johnson rather than for claimant Louis Shallat. (See page 5 of the Transcript of Record before the United States Court of Appeals, No. 12646.) For the convenience of the Court we have included the Deputy Commissioner's compensation order in claimant Shallat's case as Appendix C.

The Manos case.

Claimant Manos, who was injured on December 22, 1947, filed a claim on August 17, 1949. No compensation was paid. As found by the Deputy Commissioner, Manos received a definite and painful injury to his neck and head when he was struck on the head by an iron bar or saddle falling from above. Immediately after the accident, claimant was examined and X-rayed, and was given treatment right along by Dr. Stehr to whom he reported approximately every two weeks up to the date of the hearing. (IVR. 27.) He was advised by the doctor not to do any welding but to try to get an easy job, and not to get up on heights. His boss accommodated him in this type of work so he stayed on the job for a couple of months, at which time the whole yard was laid off. He then lost a week's time, and went to work for another employer. (IVR. 28.) He got a job as a welder, which gave him a higher scale of pay than he was getting at the time of his accident. He worked for the second employer for about a year, but still made visits to Dr. Stehr on an average of once a week. (IVR. 29.) Claimant continued to have the same symptoms as he experienced immediately following the accident, namely, that his neck "just clicks like crushing ice in there all the time, every move. It just crunches." That at first he noticed "just clicks" and that it then started developing more and more until at the time of the hearing there was a "real tight feeling as she comes as far as I can turn it to the right or left." (IVR. 30.) When asked at the hearing when he first developed that condition, claimant testified "Right

along, but just come not right at first, but since it started it continued getting worse and strong." (IVR. 31.) The first time he reported to his employer to inquire about compensation was August 17, 1949, 1 year and 8 months after the injury. (IVR. 32.)

Petitioner Cyr, in his compensation order of December 14, 1949 included among his findings of fact the following: That claimant Manos on December 22, 1947

"sustained personal *injury* resulting in *disability* when he was struck on top of the head by an iron bar falling from above and he suffered strain of the musculature in the cervical region; that written notice of the injury was not given to the employer within thirty days following said injury, but that the employer had knowledge of the injury and has not been prejudiced by lack of such written notice; that the employer furnished claimant with medical treatment, etc., in accordance with the provisions of Section 7(a) of said Act * * *." (IVR. 6.)

While it is claimed at page 8 of petitioner's brief that the District Court made "its own independent reappraisal of the evidence" and reached the conclusion that "the claimants' earning capacity had been impaired from the dates of their physical injuries so as to have entitled them at that time to compensation in addition to full wages," the fact is that the District Court's opinion was based upon the Findings of Fact included in the compensation orders of the petitioners and evidence presented as set forth above.

SUMMARY OF ARGUMENT.

A. Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 913 (a)) is a clear and unambiguous provision designating a period of limitations within which claims for compensation may be filed. While there may be some understandable basis for argument that the period ought to be extended to permit the filing of claims in cases where there have been so-called "latent" injuries, there is nothing in the language of Section 13(a) or in any other provision of the Act which would permit an interpretation which petitioners are seeking in the cases at bar. Each claimant here suffered a distinct and painful injury which caused painful symptoms and required medical treatment for varying periods of time. In all but the *Shallat* case medical treatment was required up to the date of filing of the outlawed claims.

B. Some state compensation statutes such as in California provide in addition to a statute of limitations for *original* claims, a further period within which claims for "new or further disability" may be brought. California Labor Code Section 5410.⁴

Petitioners, however, are here seeking to obtain a tortured construction which would extend the period

⁴5410. (11c), amended, 1949. "Nothing in this chapter shall bar the right of any injured employee to institute proceedings for the collection of compensation within five years after the date of the injury upon the ground that the original injury has caused new and further disability. The jurisdiction of the commission in such cases shall be a continuing jurisdiction at all times within such period. This section does not extend the limitation provided in section 5407."

of limitations indefinitely beyond the clearly defined and limited one-year period set forth in Section 13(a) of the Longshoremen's Act. If any such additional period is desirable it is for Congress alone to enact the necessary amendatory legislation.

C. The decisions mainly relied upon by petitioners as authority for extending the period of limitations provided by Section 13(a) of the Longshoremen's Act are all based upon *latent* conditions following injuries of minor consequence. Such is admittedly not the situation in any of the cases at bar, which involved known, specific, painful and disabling conditions that occurred at the time the injuries were sustained and which symptoms continued up to the time of the filing of the claims. The "latent injury" theory is based, quite understandably, upon the proposition that a claimant is excused from filing a claim where he has had no reasonable basis for knowing beforehand that the later and unexpected development is directly traceable to his original minor injury. These are special and unusual situations not at all comparable to the conditions prevailing in the present proceedings.

D. Statutes of limitations are looked upon with favor by all of our courts in order that there can be an ascertainable end to litigation. This applies to compensation acts as well as to any other statutes. If petitioners' argument were to be approved, there would never be an end to litigation arising out of claims filed under the Longshoremen's and Harbor Workers' Compensation Act, excepting only those

cases where some compensation payments had been made. This would conceivably result in a flood of stale, unmeritorious claims, and indeed, the Deputy Commissioners administering the Act would be called upon to hear and determine vast numbers of questionable claims—the very situation which petitioners are presently suggesting would be the result if the lower Court's opinion in these cases were to be sustained. Incidentally, there is no showing that such a condition now prevails. The fact of the matter is that as the law is presently interpreted by this Court in *Kobilkin v. Pillsbury*, 103 F. (2d) 667, affirmed, U. S. Supreme Court, 309 U. S. 619, rehearing denied, 309 U.S. 695, it has not been shown that compensation claimants have met with hardship or that their rights have been impaired thereby.

Petitioners at page 44 in their Brief claim that in their particular district "some 27,000 physical injuries were reported under the Act in 1946 (the last year in which detailed figures were reported) or 74 for each calendar day, in which the disability was 7 days or less" and that "if claims must be filed in all such cases to avoid the period of limitation, it would be necessary for the Deputy Commissioner, pursuant to the requirements of Section 19 of the Act (33 U. S. C. 919), upon receipt of each claim, to give notice thereof to the employer and compensation carrier, to investigate, to hold hearings and to adjudicate each claim." It is then argued that the Deputy Commissioner would find it difficult to properly perform his duties.

The foregoing is not based upon any evidence in the record, but if this Court is to take judicial knowledge of such claim, then we feel it is appropriate to point out to the Court that petitioners have long followed the practice of advising claimants who do not happen to be suffering wage loss that they should file formal claims for the very purpose of preventing such claims being barred by the statute of limitations. We shall hereafter discuss this at length and point out specifically instances and methods followed by petitioners in this common practice. In any event, if the Statute of Limitations as prescribed by Section 13(a) of the Act is deemed inadequate, we repeat, this is a matter for action by Congress and not by the Courts.

E. Petitioners' argument that the term "injury" as used in Section 13(a) of the Act should be construed to mean "compensable injury" is altogether contrary to the separate definitions of "injury" and "disability." This was clearly pointed out by the Court in the case of *Kobilkin v. Pillsbury*, supra, which case is controlling.

It would appear as set forth in footnote 13 at page 33 of respondents' brief that the real core of their argument is their contention that "compensation for disability resulting from physical injury is not barred unless the claim is filed more than a year after the employee *first becomes entitled to file a claim* for disability resulting from such physical injury." (Emphasis supplied.)

It is of utmost significance to note that no section or provision of the Act expressly or impliedly *prohibits* a claimant from filing a formal claim at any time after his injury—this regardless of whether he has suffered disability beyond 7 days. Indeed, as will be shown hereafter, petitioners themselves, as a matter of common practice where deemed necessary to protect the rights of claimants, urge and accept the filing of formal claims.

Twin Harbor Stevedoring & Tug Co. v. Marshall, 103 Fed. (2d) 513, is ample authority for the proposition that even where there is no wage loss, if the injured employee's earning capacity and ability to work is impaired he may file a formal claim for and be awarded compensation. The record shows that all of the present claimants suffered some degree of impairment of ability to work.

But aside from the question of impairment of ability to work or impairment of earning capacity, there has been no showing under the Act that there is any prohibition to the filing of claims at any time. On the contrary, as we shall demonstrate, claims have frequently been filed without any showing of wage loss.

This Court affirmed the theory followed by the lower Court that "the date of injury and not the subsequent date when incapacity develops is the one from which the time limitation must be reckoned." *Kobilkin v. Pillsbury*, *supra*. (103 F. (2d) at 669-670.)

ARGUMENT.

I

SECTION 13(a) OF THE LONGSHOREMEN'S AND HARBOR WORKERS' ACT BARS CLAIMS FOR COMPENSATION UNLESS FILED WITHIN ONE YEAR AFTER THE INJURY, AND IN THE CASES OF SPECIFIC KNOWN INJURIES THE PERIOD CANNOT BE EXTENDED.

The Longshoremen's and Harbor Workers' Compensation Act, Section 13(a), prescribes a definite period of limitations within which claims for compensation can be filed. As heretofore pointed out, the significant portion of this section (38 U. S. C. A. 913(a)) provides as follows: "The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury * * *."

In petitioner's brief the word "injury" is emphasized and this Court is urged to approve the unfounded proposition that inasmuch as the congressional bill enacting this law originally used the word "accident" instead of "injury," the substitution of the latter term indicates that Congress intended that the time for filing a claim should begin to run from the date of "compensible injury," that is, where the injury results in disability beyond seven days. There is no basis in fact or reason for the claim that Congress had any such alleged intention. It is clearly apparent that the word "injury" instead of "accident" was used because "injury" is a much broader term in the sense that many conditions may arise from injury which could not conceivably be the

basis for a claim under the term "accident." This becomes at once obvious when reference is made to Section 2 of the Act (33 U. S. C. A. 902) which has to do with "definitions." Under subsection (2) thereof the term "injury" is defined as follows: "The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment." (Emphasis added.) The foregoing definition demonstrates why the word "injury" was used in Section 13(a) instead of "accident," for the term "accident" would not include "occupational disease or infection as arises naturally out of such employment," nor would it include "injury caused by the willful act of a third person."

The reasons asserted in petitioners' brief for the substitution of the word "injury" for "accident" in Section 13(a) of the Act cannot therefore be taken seriously. That being so, the related argument that injury means "compensable injury" (disability beyond seven days) must also fall. True, some of the cases cited by petitioners go off on the ground that "compensable injury" was meant instead of "injury." It is hardly necessary to point out that had Congress intended to specify "injury" in that sense for the purpose of applying the statute of limitations it would have been a simple matter to have so designed

nated the term, as has been done by some state legislative bodies in regard to state compensation acts.

Petitioners advance the argument that "in the absence of a clear and unambiguous manifestation of Congressional intent that the period of limitation is to begin before the employee is entitled to recover compensation, no such conclusion should be drawn by the Courts." (Pet. Br. 32.) We have shown above that the provision in question is unambiguous and we shall hereafter show that Petitioners, as a matter of common practice, urge and accept the filing of claims for the very purpose of protecting claimants against the running of the statute of limitations in those cases where no temporary disability is being suffered. It is therefore not at all our argument that, as claimed, "the period of limitation is to begin before the employee is entitled to receive compensation."

The equivocal employment of the term "legal injury" as used in the petitioner's brief, is not to be ignored. If a man in the course of his employment drops a hammer on his toe and fractures it, it seems elementary to us that he has in fact, as well as in the law, suffered an injury to his toe, and whether or not compensable disability ensues does not make the injury nonetheless real or "legal." Such injured workman has suffered a real, substantial and "legal" hurt and injury.

While in some quarters there has been acceptance of the philosophy that employers' rights are to be dealt with lightly, we think they cannot be entirely

ignored, for without employers, there would be no employees, injured or otherwise. To subject an employer to a rule that would permit workmen to file claims and recover compensation five, ten, or conceivably thirty or forty years following the true, though not immediately disabling injury, depending upon the whim of the individual workman, would be to establish a rule that might well suffocate employers, and consequently employment. It hardly seems consistent with American principles that a one year limitation period should apply to one injured workman, while a period of an unlimited number of years should apply to another injured employee who may choose not to claim disability until some future date of his own selection and convenience.

It has long been an accepted elementary principle that employers and all types of defendants are entitled to know precisely the period of time during which they are validly exposed to claims and law suits. How otherwise could they conduct their businesses? Of necessity the rules must be uniform and not subject to the whim or pain tolerance of individual workmen.

The petitioners would go to great and improper extremes to protect an employee from what they suggest would be "unscrupulous conduct" upon the part of the employers, but would offer the employer no protection whatever from claims upon the part of unscrupulous employees. They would open the door to frauds against which the employer could not hope to

protect himself after the passage of a number of years and thus be at the mercy of the unsupported testimony of the claiming employee. The probabilities are that in forty years not one of us here concerned will be living to testify as to what happened with respect to an unreported injury to a presently employed workman say of twenty years of age. But under the rule proposed such young man could in forty years come before the Deputy Commissioner and testify to an alleged injury of forty years before and forthwith be compensated. This example is not a fantastic one despite the fact it is seemingly incredible.

It will be demonstrated below that the Court of Appeals for the Ninth Circuit has heretofore considered most carefully the very section involved, namely, 13(a) of the Longshoremen's and Harbor Workers' Compensation Act, and held without equivocation that the language therein used is clear and unambiguous, and that in providing that a claim is barred unless filed within one year after the injury or within one year after the date of last payment of compensation, that the section means exactly what it says. This Court affirmed the lower Court's opinion and denied a petition for rehearing.⁵

⁵*Kobulkin v. Pillsbury*, 103 F. (2d) 667, affirmed, U.S. Supreme Court, 309 U.S. 619, rehearing denied, 309 U.S. 695.

II

MODIFICATION OF ANY PROVISIONS OF THE LONGSHOREMEN'S ACT CAN BE ACCOMPLISHED ONLY THROUGH LEGISLATIVE AMENDMENT AND NOT BY JUDICIAL DECREE.

Many of the state compensation statutes, in addition to limitations of time for filing *original* claims, provide specifically for the filing of claims for so-called "new and further disability." For example, California Labor Code Section 5405 provides that proceedings may be commenced for the collection of compensation benefits within one year from the date of injury or expiration of period covered by any payment of compensation, or the date of last furnishing of medical treatment.

In addition to these periods of limitation for the filing of original claims within the one-year period, the California law prescribes a *five-year* period within which claims for "new and further disability" may be brought. See Labor Code Section 5410, which reads as follows: "Nothing in this chapter shall bar the right of any injured employee to institute proceedings for the collection of compensation within five years after the date of the injury upon the ground that the original injury has caused new and further disability * * *"

⁶Section 22 of the Longshoremen's Act, 33 U.S.C.A. 922, provides for modification of awards as follows:

"Upon his own initiative, or upon the application of any party in interest, on the ground of a change in condition or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation

The foregoing demonstrates the obvious fact that for the situations in which "new and further disability" may arise at some later time after the original injury, provision can and has been made by *legislation*, not by "judicial amendment." If the Longshoremen's Act is inadequate in this respect it is surely not for the Courts to attempt to correct such omissions; only Congress can adopt new legislation or enact necessary amendments to the existing law.

III

THE AUTHORITIES RELIED UPON BY PETITIONERS ARE CONCERNED WITH SO-CALLED LATENT INJURIES, WHEREAS THE PRESENT CASES INVOLVE SPECIFIC, DEFINITE AND OBVIOUS INJURIES OF WHICH THE CLAIMANTS WERE AT ALL TIMES FULLY AWARE.

The case of *Di Giorgio Fruit Corp. v. Norton*, 93 F. (2d) 119, certiorari denied, 302 U. S. 767 (strongly relied upon by petitioners), involved a *latent* condition following an injury consisting of contusions and lacerations to the globe of his left eye when he was struck by a bunch of bananas. He was disabled for about one week and thereafter resumed his employment for approximately ten months, following which he was confined to prison for some eighteen months. During his confinement he felt symptoms of

whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. • • •

his eye and was treated by the prison authorities. After his release from prison he obtained further treatments and in August, 1936, approximately four years after the injury, he filed a claim under the Longshoremen's Act for compensation for permanent disability resulting from the loss of the sight of his eye. In the course of the hearings before the Deputy Commissioner, claimant testified that the first time he noticed "anything serious the matter" with his eye was just a few weeks after the hearing. It was found that the injury to claimant's eye "was by its nature a progressive one" resulting from the injury and proceeding through various progressive stages of degeneration, culminating in a cataractous condition, and that the claimant "*became aware of this condition* in the month of August, 1936," four years after the injury, whereupon he immediately filed his claim. (Emphasis added.)

It is important to note the comments of the Court of Appeals in the *Di Giorgio* case, 93 F. (2d) at 120, as to whether the claimant's condition "should have been observable" by him "long prior to the time of the filing of his claim." The Court pointed out that one of the physicians testified that the condition might not have been observed by the claimant until August, 1936. This discussion obviously concerns the question of whether the claimant was *unaware of his condition* and therefore excused from filing his claim within the prescribed one-year period. The Court seemed to excuse a delay in the filing of the claim until the condition was "reasonably apparent."

The cases at bar are quite dissimilar, since each claimant here was under medical care and fully aware of his injury and continuing painful symptoms. We respectfully submit that if the holding of the Court of Appeals in the *Di Giorgio* case ever was good law it has been overruled by this Court in the case of *Kobilkin v. Pillsbury*, 103 F. (2d) 667, affirmed, U. S. Supreme Court, 309 U. S. 619, rehearing denied, 309 U. S. 695. (This opinion will be discussed fully below.)

Another case relied upon by petitioners is *Potomac Electric Power Co. v. Cardillo*, 107 F. (2d) 962. The claimant in that case was struck on the head by the metal end of an air hose. He was treated for a laceration and concussion in the emergency hospital for two days, and then returned to work without any further treatment or disability and continued working for approximately one and one-half years, from which time on he worked very little. About two years following his injury a psychiatrist informed claimant "that he was suffering from a progressive disease of the brain" caused by the said injury. Three months thereafter he filed a claim for compensation. The U. S. Court of Appeals for the District of Columbia held that the statute of limitation did not bar the claim, citing *Kropp v. Park*, 8 F. Supp. 290, and the *Di Giorgio* case, *supra*. Here again, the *Kobilkin* case is controlling, and in any event, the facts differ from the present claims in that the claimant in the *Potomac* case, except for the two days following his injury, had no medical treatment. Furthermore, there

were apparently no symptoms and the claimant was unaware of any condition resulting from the injury until approximately two years thereafter when he was examined and found to be suffering from "a progressive disease of the brain," following which he immediately filed a claim.

It is not true as claimed at page 10 of petitioners' brief in support of their application for certiorari that "The conflict of decisions among the circuits thus presented was left unresolved by this Court's later affirmance, without opinion and by an equally divided Court, of the *Kobilkin* decision." As we have pointed out, the cases which petitioners urge as authority for their tenuous position are based on *latent* conditions where the injured employees were not aware of the extent of their injuries until the serious conditions developed some time after the statutory period. In the cases at bar, each of the claimants sustained a specific injury, and each of them was under medical treatment and suffered painful symptoms from the date of their injuries up to the date of the filing of their respective claims.

Another authority is urged by petitioners, namely, *Great American Indemnity Co. v. Britton*, 179 F. (2d) 60, decided by the United States Court of Appeals for the District of Columbia Circuit, which it is claimed is in conflict with the holdings in the present cases. There the situation is quite distinguishable. In the *Great American Indemnity* case a carpenter suffered an injury to his leg, the nature of which was erroneously diagnosed by a doctor as being "an ill-

ness (a thrombosis) in the leg rather than from an accidental injury." The injury occurred on March 11, 1946, but it was not until April 4, 1947, more than one year after the accident, when claimant was examined by an orthopedic specialist who found that the achilles tendon had been torn through its major part and that an operation was required. A formal claim for compensation was filed on May 16, 1947. In holding that the claim was timely filed, the Court referred to the *Potomac Electric* case, *supra*, and held that since the claimant had been given improper medical advice to the effect that his condition was non-industrial he could not, "in good conscience" have filed a claim. The Court went on to say that

"Ignorance based on completely erroneous advice from a physician can be even more profound—and more dangerous in its consequences—than ignorance based on no advice at all. Such advice effectively prevents a conscientious employee, or a lawyer regardful of the standards of his profession, from filing a claim for an award, at least until different advice of equal or a higher standing is received. We cannot place a premium on the filing of claims which fly in the face of professional advice and ethical standards. There is no suggestion here that claimant acted negligently or in bad faith. In no sense is this case one involving mere delay and laxness in the filing of a claim." (179 F. (2d) 60, 62.)

It is of great significance to note that the Court in the *Great American Indemnity* case declared (p. 62) as follows:

"To be distinguished also is the situation in *Kobilkin v. Pillsbury*, 9 Cir., 103 F. (2d) 667, affirmed by an equally divided Court, without opinion, 309 U. S. 619, 60 S. Ct. 465, 84 L. Ed. 983. The Court there sustained the finding of the Deputy Commissioner that a claim, filed after one year had elapsed from the date when the injuries occurred, was not timely. *In that case, not only was the injury patent, but the employee at all times realized the casual connection between the accident and his subsequent suffering, the only known factors being the extent of the injury and the likelihood of recurrent suffering. No element of erroneous medical advice was present.*" (Emphasis supplied.)

It can hardly be said, therefore, that the *Kobilkin* case or the cases at bar are in conflict with the holding of the Court of Appeals in *Great American Indemnity v. Britton*, supra, which is a situation where the injured employee was not aware of the industrial character of his condition. In the *Kobilkin* case and in the cases at bar, the injured employees were fully aware of their injuries, were under medical care and suffered continuing painful symptoms.

The arguments urged in the present petition are based upon substantially the same reasons urged heretofore, and which were considered and rejected by this Court on petition for certiorari and petition for rehearing in the *Kobilkin* case. This Court has already considered and decided the question here presented.

As we have said, the reasoning of the authorities relied upon by petitioners was based in each case

upon special situations involving *latent* injuries and conditions. No such situation prevails in any of the cases at bar.

IV

THE LONGSHOREMEN'S ACT PERMITS THE FILING OF CLAIMS AT ANY TIME AFTER INJURY AND PETITIONERS HAVE LONG FOLLOWED SUCH PRACTICE.

We respectfully submit that it is not true as claimed in petitioners' brief (p. 21) that "In holding that the period of limitations begins from the time of the accident instead of from the time the injury becomes compensable, the Court below held, in effect that it begins to run before the cause of action accrues." For one thing, if an injured employee continues to suffer pain and discomfort for as long as a year from the date of his injury, his condition may well be *permanent*. In such case, he is put on notice by his prolonged and painful condition and he is authorized under the Act to file his claim for compensation. Section 19(a) (33 U. S. C. A. 919(a)) by providing that "a claim for compensation may be filed at any time after the first seven days of disability following any injury * * *" does not *prohibit* a claimant from filing a claim until there has first been a period of seven days of temporary disability. There are many cases where the injuries do not cause temporary disability, but this has never resulted in barring the filing of claims of permanent disability.

One of the very claims before this Court, namely, that of Claimant Shallat is just such a case. To fol-

low petitioners' argument to its logical conclusion, Shallat cannot maintain a claim because he has never incurred "the first seven days of disability."

Stripped of all of its ramifications, petitioners' argument simply is, as set forth on page 23 of their brief, footnote 13, that "compensation for disability resulting from physical injury is not barred unless the claim is filed more than a year after the employee first becomes entitled to file a claim for disability resulting from such physical injury."

As a matter of fact petitioners herein have long followed a practice of initiating and permitting the filing of claims by injured employees expressly to prevent the running of the statute of limitations. See Appendix B-1 where the notice indicates "U. S.-203, employee's claim for compensation filed to stop the running of the Statute of Limitations."; Appendix B-2 in which the notice provides "U. S.-203, employee's claim for compensation, filed to protect the running of the Statute of Limitations." (See attached letter); Appendix B-3 in which the notice provides "This prehearing conference or hearing is set on the initiative of the Deputy Commissioner. Statute of Limitations may run March 30, 1951"; Appendix B-4 in which the notice of hearing refers to a letter postponing the hearing indefinitely; Appendix B-5 wherein it is provided "Purpose: U. S.-203, employee's claim for compensation, filed to protect the running of the Statute of Limitations. See Attached Letter."; Appendix B-6 in which the notice provides "U. S. 203, U. S. 215 and U. S.-215A served

on the parties with this notice. See attached letter postponing hearing. Formal claim filed to toll the statute of limitations.”; Appendix B-7 which provides “U. S.-203, Formal claim filed to toll the statute of limitations. See attached letter postponing hearings” and; Appendix B-8 which is a letter from the Deputy Commissioner establishing an informal permanent disability estimate and pointing out that “As Mr. James did not lose over seven days time from work at the time of his injury he will be in danger of his right to this compensation being outlawed unless it is paid or the claim filed within one year from the date of the injury or by November 6 of this year. To be safe, Mr. James should execute and forward to this office his claim for compensation by November 1, if payment is not received by then. The forms are enclosed, as the time is short.”

Indeed, Section 19(a) (33 U. S. C. A. 919(a)) does not *prohibit* the filing of a claim until “after the first seven days of disability following injury.” The Section merely says that “A claim for compensation *may* be filed * * * at any time after the first seven days of disability following any injury.” As pointed out, if this section were prohibitive against the filing of any claim unless there was first a period of seven days of disability, claimant Shallat and many other claimants in his position would never be able to file a claim. Such an absurd result was never intended by Congress.

The reference in the statute to the filing of a claim “any time after the first seven days of disability fol-

lowing any injury" obviously is in keeping with Section 6 (33 U. S. C. A. 906) which provides that "no compensation may be allowed for first seven days of disability." In other words, since compensation for *temporary* disability could not possibly be awarded where injury causes temporary disability for seven days or less, there would be no basis for a claimant to perform the idle act of filing a claim for temporary disability in such case. However, if for example, the claimant were in need of medical treatment which the employer refused to furnish, even though no period of temporary disability were involved, the employee would still be entitled to file a claim for medical benefits. It is therefor abundantly clear that Section 19(a) (33 U. S. C. A. 919(a)) was never intended to deny the right to file a claim excepting in those cases of disability in excess of seven days.

V

THE BACKGROUND, THEORY, AND PURPOSES OF STATUTES OF LIMITATION REQUIRE THE COURTS TO LOOK WITH FAVOR UPON SUCH STATUTES, AND TO CONSTRUE THE LIMITATION LIBERALLY SO AS TO EFFECT THE INTENTION OF CONGRESS.

To adopt the contentions of petitioners would literally mean that there would be no statute of limitations whatsoever in any case where temporary disability did not extend beyond seven days, whereas in a case of injuries involving a disability period and payment of compensation beyond the waiting period,

the claim would be barred by the one-year statutory period.

A study of the origin and development of statutes of limitation indicates that while in the early development of this phase of the law such a defense was unpopular and was often circumvented by the Courts, the wisdom and need for legislations of this nature is now fully acknowledged. We refer to the following significant commentary from 34 Am. Jur. 24:

"This hostility of the Courts toward the limitation statutes seems to have been transplanted to this country as a part of the common law. In time, however, the legislative policy came to be recognized as controlling, and the duty of the Courts to give effect thereto to be fully recognized. The modern tendency is, although there are some cases which contain statements to the contrary, to look with favor upon the defense. Statutes of limitation are now considered as wise and beneficent in their purpose and tendency; they are looked upon as statutes of repose, and are held to be rules of property vital to the welfare of society. Such statutes are deemed to be in the interest of morals, serving to prevent perjuries, frauds, and mistakes, and to render people attentive to the early adjustment of demands, and prevent the disturbance of settlements which have been made but of which the proof may have been lost. While the Courts will not strain either the facts or the law in aid of a statute of limitations, nevertheless it is established that *such enactments will receive a liberal construction in furtherance of their manifest object, are entitled to the same respect as other statutes, and ought not to be explained away.*" (Emphasis added.)

See also *Fontana Land Co. v. Laughlin*, 199 Cal. 625 at page 636, wherein the Supreme Court of California held

"The power to nullify acts of the legislature prescribing a limitation upon the time within which actions may be commenced is not a judicial prerogative. Statutes of limitation have become rules of property. They are vital to the welfare of society and are favored by the law."

Again, in 34 Am. Jur. 41, it is stated that

"The courts are inclined to construe limitation laws liberally, so as to effect the intention of the legislature. Such statutes will be given the same effect as other enactments, and unless compelled to do so by the force of former decisions, *the Courts will not give a strained construction in order to evade their effect.*" (Emphasis added.)

What petitioners are asking this Court to do is to read into the statute some exception not provided for in the law. As stated in 34 Am. Jur. 44:

"In view of the favorable light in which statutes of limitation are now regarded, their application usually may not be evaded by implied exceptions, or by the interpolation of new provisions. As a general rule, the enumeration by the legislature of specific exceptions by implication excludes all others, and * * * the Courts ordinarily are without power to read into statutes, by construction, exceptions which have not been embodied therein."

We call the Court's attention specifically to the following statement contained in 34 Am. Jur. 151:

"It has been held that the Courts in construing a special statute of limitation will not read another statute into it and thus incorporate exceptions not contained therein, or give it any new or unusual interpretation."

There could never be an end to litigation arising out of claims filed under the Longshoremen's Act if petitioners' contentions were to be adopted. There would be no time limit on when a claimant could revive an old, stale claim. Were the practice to become widespread, which in all likelihood would be the case, the offices of the various Deputy Commissioners would be called upon to hold hearings on large numbers of stale and unmeritorious claims, with the effect that the very thing petitioners complain about, namely, being deluged with more claims than they could handle, would surely be the result. It would not be possible to close any claim, and the statute of limitations would become nonexistent, a situation which would plainly defeat the clearly expressed intentions of Congress.

Even the most liberal state workmen's compensation acts do not impose upon an employer unlimited liabilities forever.

VI

THE KOBILKIN CASE HOLDING THAT "ONE YEAR AFTER THE INJURY" MEANS EXACTLY THAT IS CONTROLLING.

In 1939 this Honorable Court had occasion to consider the proper interpretation to be given to Section 13(a) of the Longshoremen's Act in the case of *Kobilkin v. Pillsbury*, 193 F. (2d) 667, affirmed, U. S. Supreme Court, 309 U. S. 619, rehearing denied, 309 U. S. 695. Petitioners attempt to distinguish this case, but we believe a careful analysis of the lower Court's opinion and discussion of the meaning of this Section of the Act will demonstrate beyond doubt that the language employed by Congress means just what it says.

The claimant in the *Kobilkin* case was injured on June 7, 1935 when he was struck on the left shoulder by a sack of sugar which had dropped from a sling load. It was found that he had sustained a bad bruise from which he was disabled for three weeks following the accident, during which time compensation was voluntarily paid to him. He continued to experience physical pain but suffered no further loss of wages on account of the injury until January 9, 1937, on which date he became aware of severe pain in his shoulder and went to a doctor of his own choice who operated on his shoulder for excision of a subdeltoid bursa. It was found at the operation that there was a separation of the bones of the shoulder. On March 3, 1937 a claim for compensation was filed. The Deputy Commissioner denied the claim on the ground that it had been filed more than one year from the date

of last payment of compensation, and was therefore barred. The Court of Appeals analyzed the provisions of Section 13(a) of the Longshoremen's Act, 33 U. S. C. A. 913(a), and considered carefully not only the portion of the section dealing with claims barred because not filed within "one year after the date of last payment" of compensation, but also the provision in the section that the right to compensation "shall be barred unless a claim therefor is filed within one year after the injury." In that regard the law was declared to be as follows (103 F. (2d) 667, at 670):

"The terms 'injury' and 'disability,' separately defined in the statute are not synonymous. It has not been suggested that the injury from which appellant suffers is an occupational disease. Admittedly, it is an accidental injury arising in the course of employment. It was inflicted at the time of the accident, not when its full extent was first noted at the later time. The trauma in fact resulted in an immediate though temporary disability for which appellant was paid compensation. The circumstance that appellant again became disabled a year and a half later, and the more serious nature of the injury was then for the first time recognized, does not change the situation. The claim was not filed until more than a year after the occurrence of the injury and more than a year after the last payment of compensation. Under the plain terms of Section 13(a) of the statute the claim is barred. If we turn to Section 22 and assume a change of condition we again encounter the statutory bar."

It is manifestly clear from the foregoing language that the Court of Appeals recognized and considered the importance of the fact that the terms "injury" and "disability" are separately defined by the Act.¹

Petitioners' argument that the word "injury" in Section 13(a) should be construed to mean "compensable injury" is contrary to the separate definitions for "injury" and "disability." Nor is there any rational basis for the argument made by petitioners in the Court below that "injury" as used in the section under consideration means the date when a claimant "knows or has reason to know of the existence of his physical disability and its relation to the employment," or that "the time for filing claim does not begin to run until this awareness exists." (Page 33, petitioners' brief in Court below.)

In this respect we refer to the declaration of the Court of Appeals in the *Kobilkin* case (103 F. (2d) at 670) as follows:

"Admittedly, it is an accidental injury arising in the course of employment. *It was inflicted at the time of the accident, not when its full extent was first noted at the later time.*" (Emphasis added.)

"The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment." Sec. 2(2). "'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Sec. 2(10). (13 U.S.C.A. 902 (2), (10).)

We repeat, the same argument now made by petitioners in urging that Section 13(a) should have an interpretation different from the actual and clear wording thereof was indeed considered and rejected by this Court in affirming the lower Court's pronouncement in the *Kobilkin* case (103 F. (2d) at 670) as follows:

"It was the manifest Congressional intent to deny compensation in all cases of disability arising from accidental injury unless claim is filed within the time limited. *No provision is made for exceptional cases. We agree that the act is to be liberally construed, but neither the deputy commissioner nor the Courts have the power to legislate; and nothing short of legislation would make relief possible in a case like this.*" (Emphasis added.)

It is of utmost significance that Judge Mathews in a concurring opinion (103 F. (2d) at 671) declared emphatically that:

"As used in the Longshoremen's and Harbor Workers' Compensation Act (Section 13), the phrase 'one year after the injury' means just that. It does not mean one year after the claimant's discovery of the true nature of the injury. The Act says nothing about discovery."

Judge Mathews' discussion was not confined to claims where compensation had been paid but also to claims where none had been paid. He stated very clearly that

"the phrase 'one year after the injury' means just that. It (does not mean one year after the

claimant's discovery of the true nature of the injury." (Emphasis added.)

With regard to the cases at bar, Circuit Judge Healy of the Court below declared (IR. 46):

"the injured men appear to have suffered a disability of greater or less extent from the outset. Two of them, at least, as the Commissioner found, had to be put on lighter work, and all of them confessedly continued from the time of injury to suffer pain and discomfort from it. It is true they lost no time, or none in excess of seven days anyway, and were paid their old wage, but those facts alone do not spell absence of disability for which an award may be made. See *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 9 Cir., 103 F. 2d 513; where this Court sustained an award under like circumstances, saying that wages received by a worker who has suffered an injury are not conclusive and that ability to earn is the test."

The Court of Appeals, however, in affirming the District Court's decision annulling the petitioners' awards, reached its conclusion through a different basis:

"But we do not, as the trial Court did, rest decision on the *Twin Harbor* holding. What the Commissioner's argument really amounts to is that the statute begins to run, not from the date of the injury, but from the date of disability. The view appears irreconcilable with the plain terms of the Act. The argument necessarily assumes that the terms 'injury' and 'disability' are interchangeable. However, as we pointed out in

Kobilkin v. Pillsbury, 103 F. 2d 667, 669, the terms are separately defined in the statute and are not synonymous. Section 2(2) states that when used in the Act 'the term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury * * *.' In the same section (subdivision 10) 'disability' is defined as meaning 'incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment.' " (R. 46-47.)

A fair and accurate statement of the law, therefore, is, that where a specific trauma occurs, as distinguished from occupational disease, the *injury* is "inflicted at the time of the accident, not when its full extent" is first noted at some later time, and that the phrase in Section 13(a), "one year after the injury," means just that and it does not mean five or ten years, or an unlimited number of years, after the injury, as urged. The sheer absurdity of the position taken by petitioners is exemplified when it is broken down into the following categories:

(a) An injured workman who has suffered 8 days of disability and has received compensation for 1 day is barred from recovery of further compensation unless a claim is filed within one year.

(b) An injured workman who has suffered 7 days of disability and has received no compensa-

tion has *forever* within which time to file his claim.

No such incongruous intention can be seriously imputed to Congress.

This Court's consideration and affirmance of the lower Court's holding in the *Kobilkin* case, is the law of the land; consequently none of the cases cited by petitioners can be taken as an adequate basis for reversal of the ~~lower Court's~~ decision in the cases at bar. The *Kobilkin* case is controlling.

CONCLUSION.

From the foregoing, it is respectfully submitted that the lower Court's opinion in favor of Respondents should be affirmed.

Dated, San Francisco, California,
November 28, 1951.

LYMAN HENRY,
Proctor for Respondents.

JOHN H. BLACK,
EDWARD R. KAY,
Of Counsel for Respondents.

(Appendices A, B and C Follow.)

Appendices.

Appendix A

The relevant provisions of the Longshoremen's and Harbor Workers' Compensation Act (c. 509, 44 Stat. 1424, 33 U. S. C., Secs. 901 *et seq.*) are as follows:

SEC. 2. When used in this Act—

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(11) "Death" as a basis for a right to compensation means only death resulting from an injury.

(12) "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this Act, and includes funeral benefits provided therein.

SEC. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or

death through workmen's compensation proceedings may not validly be provided by State law.

SEC. 4. (b) Compensation shall be payable irrespective of fault as a cause for the injury.

SEC. 6. (a) No compensation shall be allowed for the first seven days of the disability, except the benefits provided for in section 7: *Provided, however,* That in case the injury results in disability of more than forty-nine days, the compensation shall be allowed from the date of the disability.

SEC. 7. (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for such period as the nature of the injury or the process of recovery may require.

SEC. 8. Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent $66\frac{2}{3}$ per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases, permanent total disability shall be determined in accordance with the facts.

(b) Temporary total disability: In case of disability total in character but temporary in

quality $66\frac{2}{3}$ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(c) Permanent partial disability: In case of disability partial in character but permanent in quality, the compensation shall be $66\frac{2}{3}$ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section respectively, and shall be paid to the employee, as follows:

* * * * *

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

(19) Partial loss or partial loss of use: Compensation for permanent partial loss of use of a member may be for proportionate loss or loss of use of the member.

(30) Disfigurement: The deputy commissioner shall award proper and equitable compensation for serious facial or head disfigurement, not to exceed \$3,500.

(21) Other cases: In all other cases in this class of disability the compensation shall be $66\frac{2}{3}$ per centum of the difference between his average weekly wages and his wage earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest.

(22) In any case in which there shall be a loss of, or loss of use of, more than one member

or parts of more than one member set forth in paragraphs (1) to (19) of this subdivision, not amounting to permanent total disability, the award of compensation shall be for the loss of, or loss of use of, each such member or part thereof, which awards shall run consecutively, except that where the injury affects only two or more digits of the same hand or foot, paragraph (17) of this subdivision shall apply.

* * * * *

(e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

(f) Injury increasing disability: (1) If an employee receive an injury which of itself would only cause permanent partial disability, but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury: *Provided, however,* That in addition to compensation for such permanent partial disability, and after the cessation of the payments for the prescribed period of weeks, the employee shall be paid the remainder of the compensation that would be due for permanent total disability. Such additional compensation shall be paid out of the special fund established in section 44 [33 U. S. Code 944].

* * * * *

APPENDIX B-1

United States of America
UNITED STATES EMPLOYEE COMPENSATION COMMISSION

IN THE MATTER OF THE CLAIM FOR COMPENSATION
UNDER THE LONGSHOREMEN'S AND HARBOR
WORKERS' COMPENSATION ACT.

WILLIAM FARRELL,

against

Claimant.

NATION TRIMMING, INC.,

Employer.

STANLEY'S FINE TRIMMING CO.,

Carrier.

Case No. 716-409

Claim No. 2614

NOTICE OF HEARING
Injury of 3-29-45

1) To Mr. William Farrell,
1415 Laurelhurst St.,
San Francisco, Calif.

2) To Nation Trimming, Inc.,
Attn: Mr. E. J. Kelly,
215 Market St.,
San Francisco, Calif.

To

You are hereby notified that upon application made by claimant

_____, an interested party in the above-entitled
claim, a hearing on such claim is hereby ordered, to be held before WARREN H. PILLSBURY

Deputy Commissioner 13th Compensation District of the United States Employees' Com-
pensation Commission, at ROOM 318, 417 MARKET STREET,

in the City of SAN FRANCISCO, CALIFORNIA, on the THURSDAY, the 17th
day of JUNE, 1945, at 10 o'clock a. m. of that day.

VS-202, employee's claim for compensation filed to stop the running of the
Statute of Limitations.
(SEE ATTACHED LETTER)

In testimony whereof, the undersigned, a Deputy Commissioner of the
United States Employees' Compensation Commission, has hereunto
set his hand at San Francisco, California,

this 16th day of June, 19 46

Warren H. Pillsbury
Deputy Commissioner.

13th Compensation District

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

WARREN H. FILLABOY

Office of Deputy Commissioner

Administering Longshoremen's and Harbor Workers' Compensation Act

LEAVE THIS SPACE BLANK

Case No. 716-409INSURANCE
CARRIER'S No. _____

June 5, 1946

NOTICE TO EMPLOYER AND INSURANCE CARRIER THAT CLAIM HAS BEEN FILED

Gentlemen:

There is enclosed copy of a claim for compensation which has been filed by claimant, William Frazee

You should proceed to pay compensation promptly when due as provided by Section 14 of the Longshoremen's and Harbor Workers' Compensation Act and to furnish medical treatment in accordance with Section 7(a) thereof, unless liability to pay compensation is controverted.

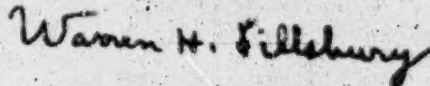
Section 14(d) provides that if the employer controverts the right to compensation he shall file with the deputy commissioner, on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

Under the Commission's regulations where claim is filed the employer or insurance carrier, within 10 days from the date notice is received that claim has been filed, is required to file answer thereto.

~~ANSWER TO BE FILED WITHIN 10 DAYS~~ ^{is} answer ~~are~~ enclosed for use in the event the right to compensation is controverted and the claim is to be opposed.

The original notice and answer should be filed with the deputy commissioner at the above address and copy thereof served upon the claimant either personally or by mailing it to the address given in the claim if you deny liability, otherwise you should proceed to pay compensation immediately as provided by the said Act and not require the claimant, as well as yourself, needlessly to incur the expenses incidental to a hearing before the deputy commissioner.

Very truly yours,



Deputy Commissioner.

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

Office of Deputy Commissioner

WARREN H. PILLSBURY

Administering Longshoremen's and Harbor Workers' Compensation Act

LEAVE THIS SPACE BLANK

CASE No. 736-409

INSURANCE

CARRIER'S No. 82

EMPLOYEE'S CLAIM FOR COMPENSATION

(To be filed with the Deputy Commissioner in accordance with sections 13 and 19 of the law)

INJURED
PERSON

1. Name of employee WILLIAM VINCENT FAXANE Employee's check No. 44347
2. Address: Street and No. 1445 Leavenworth City or town San Francisco, Calif.
3. Sex: Male Age 34 Married, single, widowed Married
4. Do you speak English? Yes Nationality American
5. State regular occupation Longshoreman
6. What were you doing when injured? Longshoreman
7. (a) Wages or average earnings per day, \$ (Include overtime, board, rent, and other allowances.) (b) Per week, \$ 50.00 (c) Were you employed elsewhere during week in which you were injured? No (d) If so, state where and when
8. Were you paid full wages for day of accident? Yes

EMPLOYER

9. Employer: Natco Terminals, Inc.
10. Office address: Street and No. 215 Market St. City or town San Francisco, Calif.
11. Nature of business Stevedoring and Terminal Operations

THE
INJURY

12. Place where injury occurred Crockett, on SS. HAWLEY
(Give place and name of vessel)
13. Name of foreman Robert Bayes
14. Date of accident or first illness, the 29th day of May, 1946, at _____ o'clock _____ M.
15. How did accident happen or how was occupational disease caused? Stopped off end of ladder into hatch opening, and fell, landing on a shovel.

NATURE
AND
EXTENT OF
INJURY

16. State fully nature of injury or occupational disease: Burn smelter and ligaments in chest.
17. On what date did you stop work because of injury? May 29, 1946
18. Have you returned to work? (Yes or No) Yes If "yes," on what date? June 12, 1946
19. Does injury keep you from work? (Yes or No) No
20. Have you done any work in period of disability? No
21. Have you received any wages since injury? Yes If so, from and to what date? Since return to work, have received wages continuously.
22. Has injury resulted in amputation? No If so, describe same

NOTICE

23. Did you request your employer to provide medical attendance? Yes Has he done so? Yes
24. Attending physician: Name Dr. Delport Address San Francisco, Calif.
25. Hospital: Name St. Luke's Hospital Address San Francisco, California
26. Have you given your employer notice of injury? (Yes or No) Yes When? May 29, 1946
27. If such notice was given, to whom? to foreman
28. Was it given orally or in writing? Orally

I hereby present my claim to the Deputy Commissioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxication, or by my willful intention, and in support of it I make the foregoing statement of facts.

Signed by

William Fox

Claimant

Dated May 22, 1946Mail address 1445 Leavenworth, San Francisco, Calif.

APPENDIX B-2
United States of America
FEDERAL SECURITY AGENCY, BUREAU OF EMPLOYEES' COMPENSATION

	J. H. B.	
	E. R. K.	
	H. W. S.	
	J. A. G.	
	R. L. F.	
	R. C. T.	
	M. J. M.	

IN THE MATTER OF THE CLAIM FOR COMPENSATION
UNDER THE LONGSHOREMEN'S AND HARBOR
WORKERS' COMPENSATION ACT.

FRED W. HOOPER,

against

Claimant.

MATSON NAVIGATION COMPANY,

Employer.

FIREMAN'S FUND INSURANCE COMPANY,

Carrier.

Case No. **1-3452**

Claim No. **3373**

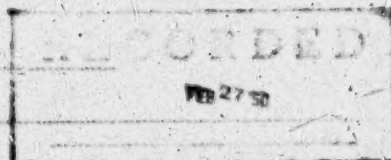
NOTICE OF HEARING

Injury of **12-12-48**

(R) To **Mr. Fred W. Hooper**
2321 Van Ness Avenue
San Francisco, California

(R) To **Matson Navigation Co.,**
213 Market St.,
San Francisco, California

(R) To **Fireman's Fund Insurance Co.,**
Attn: Mr. E. W. Kay, Attorney at Law
233 Sansome Street
San Francisco, California



You are hereby notified that upon application made by claimant

an interested party in the above-entitled

claim, a hearing on such claim is hereby ordered, to be held before **WARREN H. PILLSBURY**

Deputy Commissioner **13** Compensation District of the Federal Security Agency, Bu-
reau of Employees' Compensation, at **ROOM 126, 630 SANSOME STREET,**

in the City of **SAN FRANCISCO, CALIFORNIA,** on **FRIDAY, the 10th**

day of **MARCH**, 19**50**, at **10** o'clock **a.** m. of that day.

US-303, employee's claim for compensation, filed to protect the running of the
Statute of Limitations.

SEE ATTACHED LISTING

In testimony whereof, the undersigned, a Deputy Commissioner of the
Federal Security Agency, Bureau of Employees' Compensation, has

hereunto set his hand at **San Francisco, California**

this **24th** day of **February**

Warren H. Pillsbury

15th

Deputy Commissioner.
Compensation District.

Form UN-215A
FEDERAL SECURITY AGENCY
BUREAU OF EMPLOYEES' COMPENSATION

WARREN H. PILLSBURY

Office of Deputy Commissioner

Administering Longshoremen's and Harbor Workers' Compensation Act

LEAVE THIS SPACE BLANK

CASE No. 1-3452

INSURANCE
CARRIER'S No. _____

February 24, 1950

NOTICE TO EMPLOYER AND INSURANCE CARRIER THAT CLAIM HAS BEEN FILED

Gentlemen:

There is enclosed copy of a claim for compensation which has been filed by claimant, Fred W. Hooper

You should proceed to pay compensation promptly when due as provided by Section 14 of the Longshoremen's and Harbor Workers' Compensation Act and to furnish medical treatment in accordance with Section 7(a) thereof, unless liability to pay compensation is controverted.

Section 14(d) provides that if the employer controverts the right to compensation he shall file with the deputy commissioner, on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

Under the Bureau's regulations where claim is filed the employer or insurance carrier, within 10 days from the date notice is received that claim has been filed, is required to file answer thereto:

~~Answer must be filed~~ Answer ^{is} enclosed for use in the event the right to compensation is controverted and the claim is to be opposed.

The original notice and answer should be filed with the deputy commissioner at the above address and copy thereof served upon the claimant either personally or by mailing it to the address given in the claim if you deny liability, otherwise you should proceed to pay compensation immediately as provided by the said Act and not require the claimant, as well as yourself, needlessly to incur the expenses incidental to a hearing before the deputy commissioner.

Very truly yours,

FEDERAL SECURITY AGENCY
BUREAU OF EMPLOYEES' COMPENSATION
Warren H. Pillsbury, Deputy Commissioner
Thirteenth District
Room 126, Appenzeler Building
437 Sacramento Street
San Francisco 14, California
U. S. GOVERNMENT PRINTING OFFICE 16-57487-5

Warren H. Pillsbury
Deputy Commissioner.

FEDERAL SECURITY AGENCY BUREAU OF EMPLOYEES' COMPENSATION

LEAVE THIS SPACE BLANK

 CASE No. 2-262
 INSURANCE
 CARRIER'S No. _____
Office of Deputy Commissioner San Francisco Compensation District

Administering Longshoremen's and Harbor Workers' Compensation Act

EMPLOYEE'S CLAIM FOR COMPENSATION

(To be filed with the Deputy Commissioner in accordance with sections 13 and 19 of the law)

INJURED PERSON	1. Name of employee	<u>Fred W. Hopper</u>	Employee's check No.	_____
	2. Address: Street and No.	<u>521 Van Ness Ave.</u>	City or town	<u>San Francisco, Calif.</u>
	3. Sex	<u>Male</u>	Age	<u>36</u>
	4. Do you speak English?	<u>Yes</u>	Nationality	<u>Single</u>
	5. State regular occupation	<u>Marine Engineer</u>		
	6. What were you doing when injured?	<u>Repairing engine on S.S. "Albatross"</u>		
	7. (a) Wages or average earnings per day, \$	<u>12.00</u>	(b) Per week, \$	<u>84.00</u>
	(c) Were you employed elsewhere during week in which you were injured? (d) If so, state where and when			
8. Were you paid full wages for day of accident?	<u>Yes</u>			
EMPLOYER	9. Employer	<u>Marine Navigation Company</u>		
	10. Office address: Street and No.	<u>215 Market St.</u>	City or town	<u>San Francisco, Calif.</u>
	11. Nature of business	<u>Coastal Navigation</u>		
	12. Place where injury occurred	<u>Aboard S.S. "Albatross", San Francisco, Calif.</u>		
THE INJURY	13. Name of foreman	<u>James R. Crawford</u>		
	14. Date of accident or first illness	<u>12/15/48</u>	at	<u>10</u> o'clock <u>A</u> M.
	15. How did accident happen or how was occupational disease caused?	<u>Caught right foot in control gear, water tight door, maneuvering</u> <u>rafters, engine room.</u>		
	16. State fully nature of injury or occupational disease:	<u>Contusion right foot</u>		
NATURE AND EXTENT OF INJURY	17. On what date did you stop work because of injury?	<u>12/16/48</u>	194	
	18. Have you returned to work? (Yes or No)	<u>Yes</u>	If yes, on what date?	<u>194</u>
	19. Does injury keep you from work? (Yes or No)	<u>No</u>		
	20. Have you done any work in period of disability?	<u>No</u>		
	21. Have you received any wages since injury?	<u>Yes</u>	If so, from and to what date?	
	22. Has injury resulted in amputation?	<u>No</u>	If so, describe same	
	23. Did you request your employer to provide medical attendance?	<u>Yes</u>	Has he done so?	
	24. Attending physician: Name	<u>Dr. J. J. [unclear]</u>	Address	
	25. Hospital: Name	<u>U.S. Marine Hospital</u>	Address	<u>San Francisco, Calif.</u>
	NOTICE	26. Have you given your employer notice of injury? (Yes or No)	<u>Yes</u>	When?
27. If such notice was given, to whom?		<u>Yes</u>		
28. Was it given orally or in writing?		<u>Orally</u>		

I hereby present my claim to the Deputy Commissioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxication, or by my willful intention, and in support of it I make the foregoing statement of facts.

Signed by

Fred W. Hopper

Claimant

Dated February 23, 1950

194

Mail address

521 Van Ness Ave., San Francisco, Calif.

FEDERAL SECURITY AGENCY

**BUREAU OF EMPLOYEES' COMPENSATION
LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT
THIRTEENTH COMPENSATION DISTRICT
ROOM 126, 630 SANSOME STREET
SAN FRANCISCO 11, CALIFORNIA**

February 24, 1950

ADDRESS REPLIES TO:
THE DEPUTY COMMISSIONER

REFER TO FILE NO.

Mr. Fred W. Hooper
2521 Van Ness Avenue
San Francisco,
California

Matson Navigation Co.,
215 Market Street
San Francisco,
California

Fireman's Fund Insurance Co.,
Attn: Mr. E. H. Kay, Attorney at Law
233 Sansome Street
San Francisco,
California

Re: Fred W. Hooper, 1-3452
Matson Navigation Company
Injury of 12-12-48

Gentlemen:

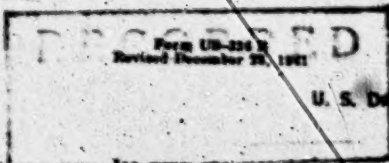
Please be advised that the hearing in the above
case now set for Friday, March 10th, 1950 at 10:00 a.m.,
at Room 126, 630 Sansome Street, San Francisco, California,
HAS BEEN POSTPONED INDEFINITELY pending return of injured
person to port and surgery as recommended.

Yours very truly,

Warren H. Pillsbury

Warren H. Pillsbury
Deputy Commissioner
13th Compensation District

pr



APPENDIX B-3

United States of America

U. S. DEPARTMENT OF LABOR, BUREAU OF EMPLOYEES' COMPENSATION

J	H	B
E	R	K
F	W	S
J	A	G
R	L	F
K	C	I
M	M	

IN THE MATTER OF THE CLAIM FOR COMPENSATION
UNDER THE LONGSHOREMEN'S AND HARBOR
WORKERS' COMPENSATION ACT.

William T. Crawford

against

Claimant.

United Engineering Company

Employer.

Fireman's Fund Ins. Co.

Carrier.

Case No. 1366-1049

PREHEARING CONF. OR

NOTICE OF HEARING

CI-3547

Inj: 9/16/47

To Mr. William T. Crawford, 1153 Divisadero Street, San Francisco, CaliforniaTo: United Engineering Company, 215 Market Street, San Francisco, CaliforniaTo Fireman's Fund Insurance Company, c/o Mr. Oughren, Attorney, 233 Sansome Street
San Francisco, CaliforniaTo Mr. Henry C. Sanford, Attorney, 714 Hobart Building, San Francisco 4, Calif.

To

To

You are hereby notified that upon application made by William T. Crawfordan interested party in the above-entitled
claim, a hearing on such claim is hereby ordered, to be held before Warren H. PillsburyDeputy Commissioner 13th Compensation District of the U. S. Department of Labor, Bu-
reau of Employees' Compensation, at Room 126, 630 Sansome Streetin the City of San Francisco, California on 26 FRIDAY, 30thday of March, 19 51, at 2:00 o'clock a. m. of that day.This prehearing conference or hearing is set on the initiative of the
Deputy Commissioner

PLEASE NOTE: Statute of limitations may run March 30, 1951.

Calendar
Filed
Acc Reporter
Reporter
sup

In testimony whereof, the undersigned, a Deputy Commissioner of the
U. S. Department of Labor, Bureau of Employees' Compensation, hashereunto set his hand at San Francisco, Californiathis 21st day of March, 19 51

Deputy Commissioner.
Compensation District.

13th

FEDERAL SECURITY AGENCY
BUREAU OF EMPLOYEES' COMPENSATION

W. H. PILLSBURY

Office of Deputy Commissioner

Administering Longshoremen's and Harbor Workers' Compensation Act

LEAVE THIS SPACE BLANK

CASE No.

INSURANCE
CARRIER'S No.

EMPLOYEE'S CLAIM FOR COMPENSATION

(To be filed with the Deputy Commissioner in accordance with sections 13 and 19 of the law)

INJURED PERSON	1. Name of employee	WM. H. T. CRAWFORD	Employee's check No.	
	2. Address: Street and No.	1153 Divisadero St.	City or town	San Francisco
	3. Sex	Male	Age	43
			Married, single, widowed	Married
	4. Do you speak English?	Yes	Nationality	Austrian
	5. State regular occupation	Marine electrician		
	6. What were you doing when injured?	Repair work, conversion work		
	7. (a) Wages or average earnings per day, \$.	None	(Include overtime, board, rent, and other allowances.)	
	(b) Per week, \$.	(c) Were you employed elsewhere during week in which you were injured?	No	
	(d) If so, state where and when			
	8. Were you paid full wages for day of accident?	Don't think so		
EMPLOYER	9. Employer	United Engineering Co.		
	10. Office address: Street and No.	215 Market St.	City or town	San Francisco
	11. Nature of business	Ship repair		
THE INJURY	12. Place where injury occurred	Pier 16, Monctonock (Cavalier)		
	13. Name of foreman			
	14. Date of accident or first illness, the	16th day of Sept., 1947	at	10 o'clock A. M.
	15. How did accident happen or how was occupational disease caused?	Fell from main deck into engine room and injured back		
NATURE AND EXTENT OF INJURY	16. State fully nature of injury or occupational disease:	Injury to back		
	17. On what date did you stop work because of injury?	September 16		1947
	18. Have you returned to work? (Yes or No)	Yes	If "yes," on what date?	can't remember
	19. Does injury keep you from work? (Yes or No)	Yes		3 times at work
	20. Have you done any work in period of disability?	Yes (music)		test
	21. Have you received any wages since injury?	Yes	If so, from and to what date?	
		November 7, 1950 to February 3, 1951		
	22. Has injury resulted in amputation?	No	If so, describe same	
	23. Did you request your employer to provide medical attendance?	Yes	Has he done so?	Yes
	24. Attending physician: Name	Dr. Delmont	Address	304 Post St.
25. Hospital: Name	St Luke's Hospital	Address	San Francisco	
NOTICE	26. Have you given your employer notice of injury? (Yes or No)	Yes	When?	1947
	27. If such notice was given, to whom?	Foreman		
	28. Was it given orally or in writing?	Orally		

I hereby present my claim to the Deputy Commissioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxication, or by my willful intention, and in support of it I make the foregoing statement of facts.

Signed by

WM. H. T. CRAWFORD

Claimant

Dated April 6

1947

Mail address

1153 Divisadero St., San Francisco

United States of America

U. S. DEPARTMENT OF LABOR, BUREAU OF EMPLOYEES' COMPENSATION

IN THE MATTER OF THE CLAIM FOR COMPENSATION
UNDER THE LONGSHOREMEN'S AND HARBOR
WORKERS' COMPENSATION ACT.

Jess I. Armenta

against

Claimant.

Arrow Stevedore Company

Employer.

Firman's Fund Insurance Company

Carrier.

Case No. 2203-100

NOTICE OF HEARING

Ind. 8/28/50

01-3630

To Mr. Jess I. Armenta, 235 N. Johnson Street, Compton, California

To Arrow Stevedore Company, Berth 179, Wilmington, California

To Firman's Fund Insurance Company, Citizens Bank Building, Attention: Mr. Murray H. Roberts, Attorney, Wilmington, California

To Firman's Fund Insurance Company, 233 Sansome Street, San Francisco, California

To Mr. Joseph London, Vice Pres., ILMU, Local 13, 234 Broad Avenue, Wilmington, California

To

You are hereby notified that upon application made by Jess I. Armenta

an interested party in the above-entitled claim, a hearing on such claim is hereby ordered, to be held before Warren H. Pillsbury

Deputy Commissioner 13th Compensation District of the U. S. Department of Labor, Bureau of Employees' Compensation, ONE CONFERENCE ROOM, LONGSHOREMEN'S DISPATCHING in the City of WILMINGTON, CALIFORNIA on the 11th day of SEPTEMBER, 1950, at 10:30 o'clock, a.m. of that day.

US-203, US-215, US-215A served on the parties with this notice

SEE ATTACHED LETTER FURNISHING HEARING

Calendar
Filed
esp

In testimony whereof, the undersigned, a Deputy Commissioner of the U. S. Department of Labor, Bureau of Employees' Compensation, has

hereunto set his hand at San Francisco, California

this 29th day of August, 1950

Warren H. Pillsbury

Deputy Commissioner.

13th Compensation District.

U. S. DEPARTMENT OF LABOR

BUREAU OF EMPLOYEES' COMPENSATION
LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT
THIRTEENTH COMPENSATION DISTRICT
ROOM 125, 520 BANSOME STREET
SAN FRANCISCO 11, CALIFORNIA

ADDRESS REPLY TO:
THE DEPUTY COMMISSIONER

August 29, 1951

REFER TO FILE NO.

Mr. Jess I. Armenta
235 E. Johnson Street
Compton, California

Arrow Stevedore Company
Berth 179
Wilmington, California

Fireman's Fund Insurance Company
Citizens Bank Building
Wilmington, California
Attention: Mr. Murray H. Roberts, Attorney

Fireman's Fund Insurance Company
233 Sansome Street
San Francisco, California

Mr. Joseph London, Vice President
ILWU, Local 13
234 Broad Avenue
Wilmington, California

Re: Jess I. Armenta, 2201-180
Arrow Stevedore Company
Inj: 8/28/50

Gentlemen:

Please be advised that the hearing now set for Tuesday, September 18, 1951 at 10:30 A.M. at the Conference Room, Longshoremen's Dispatching Hall, Wilmington, California, HAS BEEN POSTPONED INDEFINITELY.
Parties need not appear.

Yours very truly,

Warren H. Pillsbury
Warren H. Pillsbury
Deputy Commissioner
13th Compensation District

dlp:esp:sh

APPENDIX B-5
United States of America

FEDERAL SECURITY AGENCY, BUREAU OF EMPLOYEES' COMPENSATION

FEDERAL SECURITY AGENCY
BUREAU OF EMPLOYEES' COMPENSATION

Walter H. Pillsbury, Deputy Commissioner

Thirteenth District

Room 126, Appraisers Building

630 Sansome Street

San Francisco 11, California

IN THE MATTER OF THE CLAIM FOR COMPENSATION
UNDER THE LONGSHOREMEN'S AND HARBOR
WORKERS' COMPENSATION ACT.

LEE MADA,

against

Claimant.

ARROW STEVEDORE COMPANY,

Employer.

FIREMAN'S FUND INSURANCE CO.,

Carrier.

Case No. 2301-120

Claim No. 3999

NOTICE OF HEARING

Issued of 4-10-49

(A) To Mr. Lee Mada
2781 Bush St.,
San Francisco, California

Mr. Julius Stern
ILMU., Local #10
Pier 18 North
San Francisco, California

(B) To Arrow Stevedoring Co.,
310 Sansome Street
San Francisco, California

(C) To Fireman's Fund Insurance Co.,
Attn: Mr. E. R. Kay, Attorney at Law
233 Sansome St.,
San Francisco, California

You are hereby notified that upon application made by claimant

_____, an interested party in the above-entitled
claim, a hearing on such claim is hereby ordered, to be held before WALTER H. PILLSBURY

Deputy Commissioner 13th Compensation District of the Federal Security Agency, Bu-
reau of Employees' Compensation, at ROOM 126, 630 SANSOME STREET,
in the City of SAN FRANCISCO, CALIFORNIA, on THE THURSDAY, the 18th
day of MAY, 1950, at 10:00 o'clock a. m. of that day.

Purpose: US-203, employee's claim for compensation, filed to protect the running of
the statute of limitations,

(SEE ATTACHED LISTING)

In testimony whereof, the undersigned, a Deputy Commissioner of the
Federal Security Agency, Bureau of Employees' Compensation, has

Calendar
Reporter
pr

hereunto set his hand at San Francisco, California,

this 14th day of MAY, 1950.

Walter H. Pillsbury
Deputy Commissioner,
Compensation District.

Office of Deputy Commissioner WARREN H. FILLISBURY
Administering Longshoremen's and Harbor Workers' Compensation Act

LEAVE THIS SPACE BLANK

CASE No. 2201-120

INSURANCE
CARRIER'S No. _____

May 8, 1950

NOTICE TO EMPLOYER AND INSURANCE CARRIER THAT CLAIM HAS BEEN FILED

Gentlemen:

There is enclosed copy of a claim for compensation which has been filed
by claimant, Lee Breda

You should proceed to pay compensation promptly when due as provided by Section 14 of the Longshoremen's and Harbor Workers' Compensation Act and to furnish medical treatment in accordance with Section 7(a) thereof, unless liability to pay compensation is controverted.

Section 14(d) provides that if the employer controverts the right to compensation he shall file with the deputy commissioner, on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

Under the Bureau's regulations where claim is filed the employer or insurance carrier, within 10 days from the date notice is received that claim has been filed, is required to file answer thereto.

~~Answer should be filed with the deputy commissioner~~ ^{is} Answer, ~~which~~ enclosed for use in the event the right to compensation is controverted and the claim is to be opposed.

The original notice and answer should be filed with the deputy commissioner at the above address and copy thereof served upon the claimant either personally or by mailing it to the address given in the claim if you deny liability, otherwise you should proceed to pay compensation immediately as provided by the said Act and not require the claimant, as well as yourself, needlessly to incur the expenses incidental to a hearing before the deputy commissioner.

FEDERAL SECURITY AGENCY
BUREAU OF EMPLOYEES' COMPENSATION
Warren H. Fillisbury, Deputy Commissioner
Thirteenth District
Room 126, Appraisers Building
630 Sansome Street
San Francisco 11, California

Very truly yours,

Warren H. Fillisbury

Deputy Commissioner.

**FEDERAL SECURITY AGENCY
BUREAU OF EMPLOYEES' COMPENSATION**

Office of Deputy Commissioner **LAUREN H. PILLBURY**

Administering Longshoremen's and Harbor Workers' Compensation Act

LEAVE THIS SPACE BLANK

CASE No. **2201-120**

INSURANCE
CARRIER'S No.

EMPLOYEE'S CLAIM FOR COMPENSATION

(To be filed with the Deputy Commissioner in accordance with sections 13 and 19 of the law)

INJURED PERSON	1. Name of employee	Lee D. Breda	Employee's check No.	64859
	2. Address: Street and No.	2781 Bush St.,	City or town	San Francisco, Calif.
	3. Sex M	Age 52	Married, single, widowed	Married
	4. Do you speak English? Yes	Nationality		
THE INJURY	5. State regular occupation	Longshoreman		
	6. What were you doing when injured?	Working aboard ship		
	7. (a) Wages or average earnings per day, \$ max.	(Include overtime, board, rent, and other allowances.) (b) Per week, \$ max. (c) Were you employed elsewhere during week in which you were injured? no (d) If so, state where and when		
	8. Were you paid full wages for day of accident?	yes		
EMPLOYER	9. Employer	Arrow Stevedoring Company		
	10. Office address: Street and No.	310 Sansome St.,	City or town	San Francisco
	11. Nature of business	Stevedoring company		
	12. Place where injury occurred	"S. S. GATEWAY CITY" - Howards Terminal, Oakland		
THE INJURY	13. Name of foreman	A. Graham	(Give place and name of vessel)	
	14. Date of accident or first illness, the	10th day of April , 1949 at 8:00 o'clock P. M.		
	15. How did accident happen or how was occupational disease caused?	While placing roller beams in the snifter deck, I became over balanced and fell in the hatch		
	16. State fully nature of injury or occupational disease:	Injury to both ankles and right knee		
NATURE AND EXTENT OF INJURY	17. On what date did you stop work because of injury?	April 10		1949
	18. Have you returned to work? (Yes or No) Yes	If "yes," on what date?	May 16	1949
	19. Does injury keep you from work? (Yes or No) no			
	20. Have you done any work in period of disability? yes			
NOTICE	21. Have you received any wages since injury? yes	If so, from and to what date?	May 16, 1949	
	22. Has injury resulted in amputation? no	If so, describe same		
	23. Did you request your employer to provide medical attendance? yes	Has he done so? yes		
	24. Attending physician: Name Dr. Mensor Shumate	Address 490 Post St., S.F.		
	25. Hospital: Name none	Address		
NOTICE	26. Have you given your employer notice of injury? (Yes or No) yes	When? April 10, 1949		
	27. If such notice was given, to whom?	walking boss		
	28. Was it given orally or in writing?	written by gang foreman		

I hereby present my claim to the Deputy Commissioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxication, or by my willful intention, and in support of it I make the foregoing statement of facts.

Signed by

Lee Breda

2781 Bush St.,

San Francisco, Calif.

Claimant.

Dated

May 2,

1949

Mail address

copy - pr

FEDERAL SECURITY AGENCY

**BUREAU OF EMPLOYEES' COMPENSATION
LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT
THIRTEENTH COMPENSATION DISTRICT
ROOM 126, 630 SANSOME STREET
SAN FRANCISCO 11, CALIFORNIA**

May 8, 1950.

ADDRESS REPLIES TO:
THE DEPUTY COMMISSIONER

REFER TO FILE NO.

Mr. Lee Breda
2781 Hush Street
San Francisco, California

Arrow Stevedore Co.,
310 Sansome Street
San Francisco, California

Fireman's Fund Insurance Co.,
Attn: Mr. E. R. Kay, Attorney at Law
233 Sansome St.,
San Francisco, California

Mr. Julius Stern
ILWU., Local #10
Pier 18 North
San Francisco, California

Re: Lee Breda, 2201-130
Arrow Stevedoring Company
Injury of 4-10-49

Gentlemen:

Please be advised that the hearing in the above case now set for Thursday, May 18th, 1950 at 10:00 a.m., at Room 126, 630 Sansome Street, San Francisco, California, HAS BEEN POSTPONED INDEFINITELY.

Yours very truly,

Warren H. Pillsbury

Warren H. Pillsbury
Deputy Commissioner
13th Compensation District

pr

United States of America

U. S. DEPARTMENT OF LABOR, BUREAU OF EMPLOYEES' COMPENSATION

IN THE MATTER OF THE CLAIM FOR COMPENSATION
UNDER THE LONGSHOREMEN'S AND HARBOR
WORKERS' COMPENSATION ACT.

John B. Page

against

Claimant.

Jones Stevedoring Co.

Employer.

Fireman's Fund Ins. Co.

Carrier.

Case No. 195-452

al-3624

NOTICE OF HEARING

Inj: 9/16/50

To Mr. John B. Page, 1103 Orisaba, Long Beach, California

TO: Jones Stevedoring Company, Pier 4, Berth 5, Long Beach, California

To Fireman's Fund Insurance Company, Citizens Bank Building, Attention: Mr.
Murray H. Roberts, Attorney, Wilmington, California

To Fireman's Fund Insurance Company, 233 Sansome Street, San Francisco, Calif.

To Mr. Joseph Logan, Vice President, ILMU, Local 13, 234 Broad Avenue,
Wilmington, California

To

You are hereby notified that upon application made by John B. Page

, an interested party in the above-entitled

claim, a hearing on such claim is hereby ordered, to be held before Warren H. Pillsbury

Deputy Commissioner 13th Compensation District of the U. S. Department of Labor, Bu-
reau of Employees' Compensation, at The conference room, Longshoremen's Dispatching
Hall, 6343 BROAD AVENUE, WILMINGTON, CALIFORNIA
in the City of on the Tuesday, 7th

day of August, 1951, at 10:00 o'clock a. m. of that day.

U.S. 203, U. S. 215, and US-215 served on the parties with this notice.

See attached letter containing Formal claim filed to toll the statute of
limitations.

In testimony whereof, the undersigned, a Deputy Commissioner of the
U. S. Department of Labor, Bureau of Employees' Compensation, has
hereunto set his hand at San Francisco, California

this 23rd day of July, 1951

Warren H. Pillsbury

Deputy Commissioner.

13th Compensation District.

Calendar
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FEDERAL SECURITY AGENCY

BUREAU OF EMPLOYEES' COMPENSATION
LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT
THIRTEENTH COMPENSATION DISTRICT
ROOM 120, 420 SANSOME STREET
SAN FRANCISCO 11, CALIFORNIA

July 23, 1951

ADDRESS REPLY TO:
THE DEPUTY COMMISSIONER

REFER TO FILE NO.

Mr. John B. Page
1103 Orisaba
Long Beach, California

Jones Stevedoring Company
Pier A, Berth 5
Long Beach, California

Firemen's Fund Insurance Company
Citizens Bank Building
Attention: Mr. Murray H. Roberts, Attorney
Wilmington, California

Firemen's Fund Insurance Company
233 Sansome Street
San Francisco, California

Mr. Joseph London, Vice President
IUM, Local 13, 234 Broad Avenue
Wilmington, California

Re: John B. Page, 195-452
Jones Stevedoring Co.
Inj: 9/16/50

Gentlemen:

Please be advised that the hearing now set for Tuesday, August 7,
1951 at 10:00 A.M. at The Conference Room, Longshoremen's Dispatching Hall,
2343 Broad Avenue, Wilmington, California, has been postponed indefinitely.
Parties need not appear.

Yours very truly,

Warren H. Pillsbury

Warren H. Pillsbury
Deputy Commissioner
13th Compensation District

WHP:cep

APPENDIX B-7

Form UB-342
Revised December 30, 1941

REC United States of America

U. S. DEPARTMENT OF LABOR, BUREAU OF EMPLOYEES' COMPENSATION

IN THE MATTER OF THE CLAIM FOR COMPENSATION
UNDER THE LONGSHOREMEN'S AND HARBOR
WORKERS' COMPENSATION ACT.

David Neilson

against

Claimant.

Case No. 299-867

NOTICE OF HEARING 41-3690

Luckenbach Steamship Co., Inc.

Employer.

Inj: 6/13/50

Fireman's Fund Insurance Co.

Carrier.

To Mr. David Neilson, 114 West Center Avenue, Stockton, California

To: Luckenbach Steamship Co., Inc., 100 Bush Street, San Francisco, California

✓ To Fireman's Fund Insurance Company, attention: Mr. Gaughran, Attorney,
233 Sansome Street, San Francisco, California

To Mr. F. J. Javorak, Pres., Local 34, 22 North Union Street, Stockton, California

To

To

You are hereby notified that upon application made by **David Neilson**

, an interested party in the above-entitled

claim, a hearing on such claim is hereby ordered, to be held before

Warren H. Pillsbury

Deputy Commissioner **13th** Compensation District of the U. S. Department of Labor, Bu-

reau of Employees' Compensation, at **CITY HALL**

in the City of **STOCKTON, CALIFORNIA** on the **XXIX** **MONDAY, 26th**

day of **NOVEMBER** 19 **51** at **10:00** o'clock **a.** m. of that day.

U. S. 203, Formal claim filed to toll the statute of limitations,

See attached letter postponing hearing

Reporter
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In testimony whereof, the undersigned, a Deputy Commissioner of the
U. S. Department of Labor, Bureau of Employees' Compensation, has

hereunto set his hand at **San Francisco, California**

this **09th** day of **November**, 19 **51**

Warren H. Pillsbury

Deputy Commissioner.
Compensation District.

13th

U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT
THIRTEENTH COMPENSATION DISTRICT
ROOM 125, 530 SANSOME STREET
SAN FRANCISCO 11, CALIFORNIA

ADDRESS REPLY TO:
THE DEPUTY COMMISSIONER

NOVEMBER 14, 1951

REFER TO FILE NO.

Mr. David Nelson
114 West Sonoma Avenue
Stockton, California

Luckenbach Steamship Company, Inc.
100 Bush Street
San Francisco, California

Firesmen's Fund Insurance Company
Attention: Mr. Gaughran, Attorney
233 Sansome Street
San Francisco, California

Mr. F. Jaworski, Pres.
Local 54
22 North Union Street
Stockton, California

Re: David Nelson, 259-867
Luckenbach Steamship Co.
Inj: 6/13/50

Gentlemen:

Please be advised that the hearing now set for Monday, November 26, 1951 at 10:00 a.m. at the City Hall, Stockton, California, has been postponed indefinitely. Parties need not appear.

Yours very truly,

Warren H. Pillsbury

Warren H. Pillsbury
Deputy Commissioner
13th Compensation District

WHP:cap

LEAVE THIS SPACE BLANK

Office of Deputy Commissioner Warren H. Pillsbury
Administering Longshoremen's and Harbor Workers' Compensation Act

CASE No. 259-467

INSURANCE
CARRIER'S No. _____

NOTICE TO EMPLOYER AND INSURANCE CARRIER THAT CLAIM HAS BEEN FILED

November 8, 1951

Gentlemen:

There is enclosed copy of a claim for compensation which has been filed

by David Neilson

You should proceed to pay compensation promptly when due as provided by Section 14 of the Longshoremen's and Harbor Workers' Compensation Act and to furnish medical treatment in accordance with Section 7(a) thereof, unless liability to pay compensation is controverted.

Section 14(d) provides that if the employer controverts the right to compensation he shall file with the deputy commissioner, on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

Under the Bureau's regulations where claim is filed the employer or insurance carrier, within 10 days from the date notice is received that claim has been filed, is required to file answer thereto.

~~Answer must be filed within 10 days of the date notice is received that claim has been filed.~~ is
Answer ~~must~~ enclosed for use in the event the right to compensation is controverted and the claim is to be opposed.

The original notice and answer should be filed with the deputy commissioner at the above address and copy thereof served upon the claimant either personally or by mailing it to the address given in the claim if you deny liability, otherwise you should proceed to pay compensation immediately as provided by the said Act and not require the claimant, as well as yourself, needlessly to incur the expenses incidental to a hearing before the deputy commissioner.

Very truly yours,

Warren H. Pillsbury

Warren H. Pillsbury

Deputy Commissioner.

U. S. GOVERNMENT PRINTING OFFICE 16-57429-2

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Address Inquiries and Reports to
U. S. Department of Labor
BUREAU OF EMPLOYERS' COMPENSATION
Warren H. Pillsbury, Deputy Commissioner
Room 126 -- 603 California Street
San Francisco 11, California

U. S. DEPARTMENT OF LABOR BUREAU OF EMPLOYEES' COMPENSATION

Office of Deputy Commissioner

Administering Longshoremen's and Harbor Workers' Compensation Act

LEAVE THIS SPACE BLANK

CASE NO. 277-867
INSURANCE
CARRIER'S NO. _____

EMPLOYEE'S CLAIM FOR COMPENSATION

(To be filed with the Deputy Commissioner in accordance with sections 13 and 19 of the law)

INJURED
PERSON

1. Name of employee David Nelson Employee's check No. _____
2. Address: Street and No. 111 West Summer Ave. City or town Stockton, California
3. Sex M Age _____ Married, single, widowed _____
4. Do you speak English? _____ Nationality _____
5. State regular occupation Surveyor
6. What were you doing when injured? regular work
7. (a) Wages or average earnings per day, \$ 1.50 (Include overtime, board, rent, and other allowances.) (b) Per week, \$ 10.50 (c) Were you employed elsewhere during week in which you were injured? _____ (d) If so, state where and when _____
8. Were you paid full wages for day of accident? Yes

EMPLOYER

9. Employer Lockwood Steamship Co., Inc.
10. Office address: Street and No. 100 Bush St. City or town San Francisco, Calif.
11. Nature of business Steamship Transportation

THE
INJURY

12. Place where injury occurred On board SS EDGEMORE
13. Name of foreman C. Perow, Marine Dept.
14. Date of accident or first illness, the 13 day of June, 1950 at _____ o'clock _____ M.
15. How did accident happen or how was occupational disease caused? Slipped and fell on deck load

16. State fully nature of injury or occupational disease: _____

Fracture, right wristNATURE
AND
EXTENT OF
INJURY

17. On what date did you stop work because of injury? _____ 1950
18. Have you returned to work? (Yes or No) Yes If "yes," on what date? June 13 1950
19. Does injury keep you from work? (Yes or No) various
20. Have you done any work in period of disability? regular work, yes
21. Have you received any wages since injury? No If so, from and to what date? _____
22. Has injury resulted in amputation? Yes If so, describe same various
23. Did you request your employer to provide medical attendance? _____ Has he done so? _____
24. Attending physician: Name Yountress _____
25. Hospital: Name Gilbert M. Barrett, M.D. San Francisco, Calif.
26. Have you given your employer notice of injury? (Yes or No) Yes When? immediately 1950
27. If such notice was given, to whom? Yes immediately
28. Was it given orally or in writing? _____

NOTICE

I hereby present my claim to the Deputy Commissioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxication, or by my willful intention, and in support of it I make the foregoing statement of facts.

Signed by

David Nelson

Claimant.

Dated

Oct 251950

Mail address

U. S. GOVERNMENT PRINTING 111 West Summer Ave., Stockton, Calif.

APPENDIX B-8

U. S. DEPARTMENT OF LABOR

BUREAU OF EMPLOYEES' COMPENSATION
LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT
THIRTEENTH COMPENSATION DISTRICT
ROOM 112, 230 SANSOME STREET
SAN FRANCISCO 11, CALIFORNIA

ADDRESS REPLIES TO:
THE DEPUTY COMMISSIONER

REFER TO FILE NO.

October 24, 1951

Mr. Jimmy O. Jones
225 Santa Barbara
Los Angeles, California

Arrow Stevedore Company
Berth 179
Wilmington, California

Fireman's Fund Insurance Co.
233 Sansome St.
San Francisco, California

Mr. Murray H. Roberts, Atty.
Citizens Bank Bldg.
Wilmington, California

Re: Jimmy O. Jones, 2201-171
Arrow Stevedore Co.
Inj: 11-6-50

Gentlemen:

The report of my impartial medical examiner, Dr. George W. Jones, of October 1, 1951, was received about that time and copies given all parties. The case is now ready for informal permanent disability estimate. I adopt Dr. Jones' estimate of loss of 20 percent of the use of the right index finger. This entitles Mr. Jones to compensation at \$35.00 a week for 5.6 weeks amounting to \$196.00 all of which has accrued.

As Mr. Jones did not lose over seven days time from work at the time of his injury he will be in danger of his right to this compensation being outlawed unless it is paid for the claim filed within one year from the date of the injury or by November 6 of this year. To be safe, Mr. Jones should execute and forward to this office his claim for compensation by November 1, if payment is not received by then. The forms are enclosed, as the time is short.

Yours very truly,

Warren H. Pillsbury
Deputy Commissioner
13th Compensation District

WHP:kl

Enclose Form U-203

Appendix C

**In the Matter of the Claim for Compensation Under
the Longshoremen's and Harbor Workers'
Compensation Act**

LOUIS SHALLAT,

Claimant,

against

MATSON TERMINALS, INC.,

Employer,

FIREMAN'S FUND INSURANCE COMPANY,

Insurance Carrier.

**COMPENSATION ORDER—AWARD OF
COMPENSATION**

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

Findings of Fact

That on the 21st day of November, 1947, the claimant above-named was in the employ of the employer above named at San Francisco Harbor, in the State of California, in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Fireman's Fund

Insurance Company; that on said day claimant herein while performing service for the employer as a longshoreman and engaged in stevedoring operations on a vessel upon navigable waters of the United States at said harbor sustained personal injury arising out of and in the course of his employment and resulting in disability as follows: He caught his left hand between a sling and a bight, causing a contusion of the left hand and exacerbation of a pre-existing progressive arthritis of the proximal joint of the second or middle finger; that the employer furnished claimant with medical treatment, etc., in accordance with Section 7(a) of the said Act; that the average weekly earnings of the claimant herein at the time of his injury amounted to the sum of \$90.00; that claimant did not sustain at said time any sufficient injury to the right hand to be a cause of any disability therein; that no compensation has been paid; that the claim for compensation was filed on May 23rd, 1949, the employer's first report was filed in the office of the Deputy Commissioner on February 16th, 1948, that by reason of the absence of any temporary disability claimant did not become entitled to any compensation payments for which he could make claim until the condition of his left second finger reached a permanent stage and became a permanent disability, that said permanent disability became fixed within one year prior to the filing of the claim and the claim is not barred by limitations; that by reason of his injury claimant has sustained permanent disability amounting to loss of 50% of the use

of his finger end entitling him to compensation for 9 weeks at \$25.00 a week, amounting to \$225.00, no part of which has been paid; that claimant's physician, Dr. V. C. Stehr, has rendered service to claimant in the prosecution of his claim consisting in examination and filing of a report for use as evidence herein, that a fee is charged and approved therefor in the sum of \$25.00, and lien granted therefore upon compensation herein awarded claimant.

Upon the foregoing facts the Deputy Commissioner makes the following:

● Award

That the employer, Matson Terminals, Inc., and the insurance carrier, Fireman's Fund Insurance Company, shall pay to the claimant compensation as follows:

To claimant the sum of \$225.00 forthwith, less however the sum of \$25.00 to be deducted therefrom and paid to claimant's physician, Dr. V. C. Stehr, upon his lien for fee for examination and report.

Given under my hand at San Francisco, California, this 28th day of July, 1949.

WARREN H. PILLSBURY,
Deputy Commissioner,
13th Compensation District.